(22,685)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 296.

FOURCHE RIVER LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

BRYANT LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Caption.*

Pleas before Hon. F. Guy Fulk, Judge of the Pulaski Circuit Court, Second Division, had on April 7th, 1910, in the Case of Bryant Lumber Company, Plaintiff, vs. Fourche River Lumber Company, Defendant.

Jury trial.
Judgment for plaintiff in the sum of $3978.00.

2 *Change of Venue.*

In the Perry Circuit Court. August Term thereof, 1909.

Proceedings August 4th, 1909.

No. 829.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Now, on this day comes the plaintiff, Bryant Lumber Company, by Mehaffy, Williams, Cockrill and Armistead and by consent of all parties this cause is transferred from Perry County Circuit Court, to the Pulaski County Circuit Court, and the clerk of this court is hereby ordered and directed to transmit all the original papers in said cause without delay to the clerk of the Circuit Court of Pulaski County, Ark.

STATE OF ARKANSAS,
Perry County:

I, B. D. Taylor, Clerk of the Circuit Court in and for the county aforesaid do hereby certify that the above and foregoing order as above referred to contain- a true and perfect copy from the record of the proceedings of the said court, as the same appears from the Circuit Court Record "D" at page 12.

Witness my hand and seal on this 27th day of August, 1909.

B. D. TAYLOR,
Clerk of the Perry Circuit Court,
By W. F. TARVIN,
Deputy Clerk.

(Endorsed): "Filed September 4, 1909. F. J. Ginocchio, Clerk. L. J. Gibson, D. C."

3 *Complaint.*

In Perry Circuit Court.

BRYANT LUMBER COMPANY
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Complaint at Law.

The plaintiff Bryant Lumber Company states that it is a corporation organized and doing business under the laws of the State of Arkansas and that the defendant Fourche River Lumber Company is a corporation organized and doing business under the laws of the State of Arkansas and that each of said parties is engaged in the sawmill and lumber business.

That on the 3rd day of August, 1905, the plaintiff and defendant entered into the following contract:

"This agreement made this the 3rd day of August, 1905, by and between the Fourche River Lmbr. Co., a corporation organized and doing business under the laws of the State of Arkansas, hereinafter called the Fourche Company, and the Bryant Lbr. Co., a corporation organized and doing business under the laws of the State of Arkansas, hereinafter called the Bryant Company, witnesseth:

Whereas the Fourche Company has a constructed railroad over and across lands belonging to the Bryant Company, with respect to which controversy has arisen between the parties hereto detrimental to the interests of each, the Fourche Company claiming that the railroad was built on said land under authority from the Bryant Company, and the Bryant Company denying that it gave such authority, and alleging that it was built without any authority; and

Whereas, the parties wish to settle their controversies in so far as they affect the future rights of any and all parties and their successors as to the building, maintaining and operating a railroad, and the granting of rights of way, hauling freight, etc., and

Whereas the parties have mutually agreed to settle said
4 controversy upon the terms hereinafter set out:

Now, therefore said parties, in consideration of the promises and their mutual covenants and agreements made each with the other, hereby agree as follows:

1. The Fourche Company will cause to be hauled timber off of all lands now owned by the Bryant Company, as well as off of all lands on which it has acquired timber rights, as the title to said lands and timber rights is shown by the records of Perry County, when loaded on its cars and on its railroad by the Bryant Company, at the rate of 37½ cents per thousand feet.

2. The Fourche Company agrees that for a period of ten years from date, it will cause to be hauled the timber of the Bryant Company for its mill off of lands which it shall hereafter acquire, or upon which it shall hereafter acquire timber rights, when loaded

on its cars on its railroad at a price to be fixed by arbitration as is hereinafter set out. And the Fourche Company agrees that when loaded cars are received from the Bryant Lbr. Co. they will be carried forward to destination, if consigned to a point on the line of the Fourche River Valley & Indian Territory Railroad, or to the end of its line, if consigned beyond it, without transfer or freight from one car to another.

3. The Fourc-e Company agrees that the Bryant Company may build tramroads or railroads connecting with its railroad and the railroad of the Fourche River Valley & Indian Territory Railroad Company, as now built or hereafter constructed, for the purpose of hauling any timber that it may now own or hereafter acquire, at any place where such tram-road or railroad of the Fourche Company had already loacted; and it will cause to be hauled for the Bryant Company any engines or cars it may desire to use on its road from the Choctaw Railroad to its railroad, and when the use of its road is discontinued, the Fourche Company will again cause to be hauled such engine or cars from the discontinued road to
5 any point on its line where the Bryant Company may have built another road; but the Bryant Company will not be authorized to operate its engines or cars on the line of the Fourche Company.

4. The Fourche Company agrees that whenever the Bryant Company desires to build a railroaf or tramroad connecting with its road or the road of the Fourche River Valley & Indian Territory Railroad Company to reach any timber which it now owns or may hereafter acquire, that the Fourche Company will give the right of way over any land that it then owns for the purpose of building such railroad or tramroad, but the same must not in any way interfere with the construction or operation of the Fourche Company.

5. This contract is made by the Fourche Company in contemplation of perfecting the incorporation of the Fourche River Valley & Indian Territory Railroad Company, whose articles of incorporation and map are now on file in the office of the Secretary of State, and of its acquiring and operating a line of road herein referred to; and the Fourche Company agrees that it will pay any difference between the price that may be charged by the Railroad Company for the hauling of the timber now owned or her-after acquired by the Bryant Lumber Company, and the price fixed for said service by the terms of this contract, and further agrees that said Railroad Company will perform the railroad service for which it herein binds itself.

6. The Fourche Company agrees that it will cause the incorporation of the Fourche River Valley & Indian Territory Railroad Company as soon as they can procure a hearing before the Board of Railroad Incorporations, to renew their application for a charter for the Fourche River Valley & Indian Territory Railroad; that if said charter is granted it will guarantee completion of the construction of the road called for within five years from the date of the charter,
6 and that the work of construction shall progress as rapidly as one-fifth part of the part now unconstructed each year, it being understood that if an amount in excess of one-fifth

shall be constructed one year, such excess may be deducted from what the Company is required to construct any succeeding year. It further agrees that the line as constructed shall not vary more than one mile laterally from the preliminary survey now on file in the office of the Secretary of State, and that such variation if made shall be in the same valley, no mountains or hills between it and the line of the preliminary survey now on file, that if the variation from the line of the preliminary survey shall be more than a mile in the same valley with no mountains or hills between, at any point where the Bryant Company shall build a connecting switch to reach its timber, it will pay the cost of an additional length of the strip that the Bryant Company was required to build on account of the deviations beyond one mile, or if there is any deviation so that the line as constructed is in a different valley, or on the other side of hills or mountains from the line of the preliminary survey, then it will pay the cost of switches made necessary by the variation from the line as indicated on the preliminary survey, which shall be full satisfaction for any claim the Bryant Company has on account of such deviation, provided that no claim can be made by the Bryant Company, under this provision for building a switch to reach timber purchased by it after it receives notice of where the line of railroad is to be constructed, or which shall not appear to belong to it on the records of the County within ten days after it receives notice of where the line of railroad will be constructed except that exhibition to the Fourche Comany of instruments evidencing acquisition of timber within such ten days shall be equivalent to filing for record, and the railroad shall be constructed on the line indicated in the notice given to the
7 Bryant Company, it will attach an exact map showing the line of railroad.

The Bryant Company agrees:

1. That it will join with the incorporators of the Fourche River Valley & Indian Territory Railroad Company, in accordance with the articles of association and map heretofore presented to the Board and now on file in the office of the Secretary of State.

2. It agrees that the Fourche River Valley & Indian Territory Railroad Company, may occupy and enjoy the right of way now occupied by the railroad of the Fourche Company over the lands of the Bryant Company as hereinbefore set out, and that it will execute the necessary deed of conveyance fully investing said Fourche River and Indian Territory Railroad Company with said right of way for railroad purposes, as soon as the said Fourche River Valley & Indian Territory Railroad Company is duly incorporated and organized, and it furthermore agrees that the said Fourche River Valley & Indian Territory Railroad Company shall have a free right of way over the lands of the Bryant Lumber Company, now owned or hereafter acquired for the purpose of constructing the unconstructed parts of its road, and that upon the incorporation and organization of the Fourche River Valley & Indian Territory Railroad, the said right will be granted to it.

And it agrees that the Fourche Company may have the free right

of way over the lands of the Bryant Company acquired or to be acquired for the purpose of building tramroads to reach its timber, but such right of way must be taken so as not to interfere with the construction or operation of the road of the Bryant Company.

8 The Parties Mutually agree:

That the price for hauling future acquired timber of the Bryant Company over the railroad of the Fourche River Valley & Indian Territory Railroad Company, shall be fixed by a Board of Arbitration composed of Judge Robert J. Lea and two other men, one to be chosen by each of the parties hereto. Said Board shall have the authority to settle any other differences that may arise between the parties hereto as to the details of carrying out this contract, such as hauling, loading and unloading of timber and other freight, and the time when and the manner in which it is to be done, so that the Bryant Company shall be secured against any discrimination in favor of the Fourche Company in the transaction of its business; and the Fourche Company shall be required to carry timber and other freight equally and impartially without discrimination for or against the Bryant Company. And it is understood that each party shall have such fair and equal opportunities, so they can compete in all respects with each other in the purchase and holding of the lands, timber and other interests in the territory and on and with the railroad. And the Fourche Company agree that neither it nor the Fourche River Valley & Indian Territory Railroad Company will do any act that will prevent the Bryant Lumber Company from having a fair opportunity to compete with the Fourche Company in all respects in the purchase, holding and sale of lands or timber or the products thereof in that vicinity, or in the transportation of freight over said road, but this shall not preclude the right of the Fourche Company to actively prosecute its mill business or to buy and sell lands, timber or the products thereof as it deems proper. And when said arbitrators shall agree upon the said price,

9 or agree as to any other matter of difference submitted to them as above provided, their decision shall immediately become a part of this contract, binding upon the parties as if originally written herein, and the parties agree that such decision shall be signed by each of them and attached to the original draft of this contract as a part hereof. And to the end that a practical working arrangement between the parties be made, if any dispute or difference arise in interpreting the finding of the Board, the parties agree that such matter shall be referred again for further adjudication or explanation until the decision of the arbitrators is plain, and a practical working arrangement is perfected.

The Board of Arbitrators shall convene at a time and place to be fixed by them, of which the Judge who shall preside at its meetings shall give one week's notice to each party.

And it is further mutually agreed by the parties hereto that each shall have the right to cross the other's land for the purpose of removing its own timber, but in so doing, neither party shall interfere with the work of the other nor cut or damage any timber.

The parties agree that they will cause this contract to be ratified

by the Board of Directors of their respective companies within fifteen days from the date of the signing by the Presidents; and the Fourche Company agrees that it will cause this contract to be ratified by the Board of Directors of the Fourche River Valley & Indian Territory Railroad Company within fifteen days from the date of its incorporation as a railroad company, provided such ratification by the railroad company shall not bind it to fix the rates fixed by this contract.

No application shall be made to the Board of Railroad Incorporators for the incorporation of the Fourche River Valley & Indian Territory Railroad Company until this contract is ratisfied by the respective Boards of Directors of the Bryant Lumber Company and the Fourche Company as provided for. This contract shall not affect or prejudice any actions at law or in equity now pending in the courts of the State between any of the parties hereto, their agents, officers or employees, and this contract shall be void unless the charter of the Fourche River Valley & Indian Territory Railroad Company shall be granted by the Board of Railroad Commissioners within sixty days from this date.

(Signed) FOURCHE RIVER LUMBER COMPANY.
BRYANT LUMBER COMPANY.

Said contract provides among other things "that the prive for hauling future acquired timber of the Bryant Company over the railroad of the Fourche River Valley & Indian Territory Railroad Company shall be fixed by a Board of Arbitrators composed of Robert J. Lea and two other men, one to be chosen by each of the parties hereto, and said Board shall have the authority to settle any other differences that may arise between the parties hereto as to the details of carrying out this contract, such as hauling, loading and unloading of timber and other freight, and the time when, and the manner in which it is to be done, so that the Bryant Company shall be secured against any discrimination in favor of the Fourche Company in the transaction of its business; and the Fourche Company shall be required to carry timber and other freight equally and impartially, without discrimination for or against the Bryant Company. And it is understood that each party shall have such fair and equal opportunities, so they can compete in all respects with each other in the purchase and holding of the lands, timber and other interest in that territory, and on and with the railroad. And the Fourche Company agrees that neither it nor the Fourche River Valley & Indian Territory Railroad Company will do any act that will prevent the Bryant Lumber Company from having a fair opportunity to compete with the Fourche Company in all respects in the purchase, holding and sale of lands or timber or the products thereof in that vicinity or in the transportation of freight over said road."

Plaintiff states that it complied with all the terms, conditions and requirements of the Contract, but that the defendant did not comply with the Contract on its part.

Plaintiff states that the Fourche River Lumber Company re-

fused to permit the Bryant Lumber Company to load its logs as the contract required; and states also that said company declined to put in a switch as was its duty to do, so that the Bryant Lumber Company might load its logs; that it refused to establish the switches or the maximum for grades and curvatures for the building of switches and that the defendant refused to secure this plaintiff the same freight concessions from the Fourche River Valley & Indian Territory Railroad Company that the defendant enjoyed and that on the 17th day of April, 1907, the plaintiff submitted the following proposition to be arbitrated by the arbitrators:

"First. That the Bryant Lumber Company be permitted to load logs on the Railroad on all places where the Fourche River Lumber Company have loaded and are loading logs, but Bryant Company shall load between 4 p. m. and 9 a. m. of the next day.

Second. That the unloading switch on the Fourche River be put in at once.

Third. That the maximum for grades and curvatures for the building of switches be established at once.

Fourth. That the Fourche River Lumber Company through the Fourche River Valley & Indian Territory Railroad Company shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same
12 freight concessions as are now enjoyed by the Fourche River Lumber Company through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company."

That the Board of Arbitrators met on the 24th of October, 1907, both plaintiff and defendant being present and represented by attorneys, and made the following award:

"The arbitrators grant the first demand with the proviso that all cars be loaded between 4 p. m. and 9 a. m. of the next day.

On the second and third propositions, the Board rule that the maximum curve shall be 12 degrees and the maximum grade of switches be 1½% (one and one-half per cent), except where there is a reversed curve, when it may be two per cent, and that the Fourche River Lumber Company be required to lay the iron on the unloading switch at Fourche River whenever the ties are laid and these grades and curves are conformed to. This and all other switches are to have proper rises and dumps at the end to prevent cars running off.

The Fourche River Lumber Company protests against the arbitrators taking jurisdiction of the fourth proposition on the ground that it is beyond the terms of the submission; but the Board (Mr. Grayson dissenting) overrules the objection, and rules that the Fourche River Lumber Company be required to pay the Bryant Lumber Company the same differentials that the Fourche River Valley & Indian Territory Railroad receives on interstate shipments of the Fourche River Lumber Company, to which ruling the Fourche River Lumber Company excepts.

(Signed)

ROB'T J. LEA.
W. GRAYSON.
C. W. LEWIS."

That both parties submitted the above proposition and all the differences and disputes in reference thereto to the award, arbitrament and final determination of Judge Robert J. Lea, W.
13 Grayson and C. W. Lewis, chosen as provided for in the contract between the parties and they arbitrated and determined concerning the disputes and differences between the parties and that the parties mutually promised each other both in the contract and at the time of the award to abide by and perform the award of the arbitrators.

That said arbitrators met at the time mentioned above and duly made and published the award above set out, and notified the parties and they thereby awarded and declared, after due appearance before them of both parties and found as above set forth.

The plaintiff has duly performed all the conditions of said award on its part but the defendant then and there and has ever since refused to perform the award on its part.

That on the fourth proposition, the failure of the defendant to perform the award by paying the Bryant Lumber Company the same differentials that the defendant receives from the Fourche River Valley & Indian Territory Railroad Company on through rates over the Rock Island amounts to $2845.20 up to the — of Aug., 1907.

Plaintiff says that by said failure it has been damaged in the sum of $2845.20 and that there is now due to it from defendant said sum, with interest at the rate of 6% per annum.

Plaintiff further says that on the first proposition in said award that defendant not only did not comply with the award made by the arbitrators but that it wrongfully removed the track of the railroad company so that it could not comply with it and that this damaged the plaintiff in the sum of $1500.00.

That on the second proposition and award by the arbitrators defendant refused to comply with the award of the arbitrators by building the switches as provided in said award and that their failure to do this damaged the plaintiff in the sum of $2500.

14 Wherefore the plaintiff prays judgment against defendant in the sum of $6845.20, with interest and all other proper relief.

MEHAFFY, WILLIAMS, COCKRILL & ARMISTEAD, *Attorneys for Plaintiff.*

(Endorsed:) "Filed in my office and summons issued April 17, 1909. B. D. Taylor, Cler-, by W. F. Tarvin, D. C.

Filed Sept. 4th, 1909.

F. J. GINOCCHIO, *Clerk.*
L. J. GIBSON, *D. C.*

(Return of summons shows service on the President of the Fourche River Lumber Company May 3, 1909.)

15 Pulaski Circuit Court, Second Division, March Term, 1909.

THURSDAY, *September 16th*, 1909.

5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY.

Filing Motion to Make More Specific.

Comes the defendant by its attorneys Rose, Hemingway, Cantrell & Loughborough and by leave of court, files herein its motion to require plaintiff to make its complaint more definite and specific.

16 *Motion to Make Complaint More Specific.*

In the —— Circuit Court.

BRYANT LUMBER COMPANY
vs.
FOURCHE RIVER LUMBER COMPANY.

Motion to Require the Plaintiff to Make Its Complaint More Definite and Specific.

The defendant says that the complaint herein is so indefinite that the defendant is not able to answer the same, nor prepare for trial; and it asks that the plaintiff be required to make its complaint more definite and specific in the following particulars:

1. That the plaintiff be required to state the dates and places where the defendant refused to allow the plaintiff to load its logs as required by the contract; and also the amount of logs which the defendant refused to allow the plaintiff to load on each date, and at each place.

2. That the plaintiff be required to specify the date when the defendant declined to put in a switch, and the place where such switch was to be put in.

3. That the plaintiff be required to state what switches the defendant has refused to establish and in what cases it has refused to build switches according to the grades and curvatures provided by the finding of said arbitrators, specifying whether the said Bryant Lumber Company had first prepared the grade and laid the crossties; also giving the dates of the refusals and the exact location of the proposed switches, and stating whether the demand was made in writing or verbally, and by what officer of the plaintiff and upon what officer of the defendant.

4. That the plaintiff be required to state on what ship-
17 ments of lumber it has received the differentials claimed, giving the date of each shipment, the initial and car number, the destination of said lumber and itemized statement of contents of car, the weight of contents of car, the point from which said lumber was shipped and whether any claim has been made against any railroad company on account of overweight claimed on shipment, and if so, the amount in pounds of this claim; also the point of origin of the logs from which said lumber on each car was made.

5. That the plaintiff be required to specify what track belonging to the defendant was taken up, when it was taken up, how long it had been down, and what switches the plaintiff wished to install in connection with said track, and what timber plaintiff had which could be loaded at said switch; and if any logs were cut down adjacent to said track, how long said logs had been cut down and brought to the track before the said track was taken up.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

(Endorsed:) "Filed Sept. 16, 1909. F. J. Ginocchio, Clerk. L. J. Gibson, D. C."

18 *Motion Overruled.*

September Term, 1909.

SATURDAY, *February 5th*, 1910.

5768.

BRYANT LUMBER COMPANY, Plaintiff,

vs.

FOURCHE RIVER LUMBER COMPANY, Defendant.

On this day the defendant's motion to make plaintiff's complaint more specific, heretofore filed and submitted to the Court, is by the Court overruled.

To which ruling of the Court in overruling said motion to make more specific the defendant at the time excepted and asked that its exception be noted of record which is hereby accordingly done.

19 *Filing Motion to Make More Specific.*

SATURDAY, *February* 26, 1910.

5768.

BRYANT LUMBER COMPANY, Plaintiff,

vs.

FOURCHE RIVER LUMBER COMPANY, Defendant.

Comes defendant by its attorneys J. F. Sellers and Rose, Hemingway, Cantrell & Loughborough and by leave of the Court files herein its motion to make more specific.

20 *Filing Answer.*

March Term, 1910.

TUESDAY, *March 15th*, 1910.

5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Comes the defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and by leave of Court, files herein its answer.

21 *Answer.*

In the Pulaski Circuit Court.

BRYANT LUMBER COMPANY
v.
FOURCHE RIVER LUMBER COMPANY.

Answer.

1. The defendant denies that the plaintiff has complied with all the terms, conditions and requirements of the contract set out. And it also denies that the defendant has failed to comply with any part of the said contract obligatory on it.

2. It denies that it has refused to permit the plaintiff to load its logs as the contract requires. It also denies that it has declined to put in any switch which it was required by the terms of said contract to put in. It also denies that it has refused to establish the maximum for grades, and curvatures for the building of switches; and it denies that it has refused to secure to the plaintiff any freight concessions from the Fourche River Valley and Indian Territory Railway Company which that Company could lawfully grant, or which were contemplated in said contract.

3. It says that the fourth proposition submitted to the said board of arbitrators and set forth in said complaint was not within the terms of the submission to arbitration, and that as to said fourth proposition, the said board of arbitrators was without authority to make the award thereon set forth in the complaint.

4. It is not true that the defendant wrongfully removed any portion of the track of the said Railroad Company.

ROSE, HEMINGWAY, CANTRELL &
LOUGHBOROUGH, *For Defendant.*

(Endorsed:) "Filed March 15, 1910. F. J. Ginocchio, Clerk. L. J. Gibson, D. C."

22 *Filing Demurrer & motion to Make More Specific.*

WEDNESDAY, *March 23rd*, 1910.

5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Comes defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough and by leave of Court files herein its demurrer and also its motion to make more specific.

Demurrer to Complaint.

23 In the Pulaski Circuit Court.

BRYANT LUMBER COMPANY
vs.
FOURCHE RIVER LUMBER COMPANY.

Demurrer to Complaint.

The defendant demurs to that part of the complaint which seeks damages for the refusal of the defendant to perform the fourth item in the award of the arbitrators, and to pay to the plaintiff the differentials received by the Fourch- River Lumber Company on the plaintiff's logs.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Defendant.*

(Endorsed:) "Filed March 23, 1910. F. J. Ginocchio, Clerk, L. J. Gibson, D. C."

24 In the Pulaski Circuit Court.

BRYANT LUMBER COMPANY
vs.
FOURCHE RIVER LUMBER COMPANY.

Motion to Make More Specific.

The defendant respectfully represents to the court that it has, in conjunction with its counsel, endeavored to prepare this case for trial, but finds it is entirely unable to do so because the allegations of the complaint are so vague and indefinite that they do not advise the defendant of the nature of the controversy between the parties.

1. The complaint states that the defendant has refused to allow

the plaintiff to load its logs as required in the contract, but it does not state where said logs were located, nor the time of refusal, nor the place where the plaintiff desired to load them.

2. Said complaint further states that the defendant declined to put in a switch, but it does not state when the request therefor was made nor where the switch was to be located.

3. It says that the railway company took up a portion of its track, but it does not state what portion, nor when it was taken up, and as no part of the track of the railroad has ever been taken up to defts. knowledge and the defendant is at a loss to know the nature of the complaint which the plaintiff is making.

4. The complaint alleges that the plaintiff is entitled to differentials on lumber shipped, but it does not state what the lumber was, nor to what point it was shipped, nor when, so that the defendant can not investigate the facts in reference thereto.

The defendant therefore prays that the plaintiff be required to make its complaint more specific in all these particulars.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Defendant.*

(Endorsed:) "Filed March 23, 1910. F. J. Ginocchio, Clerk, L. J. Gibson, D. C."

5768.

BRYANT LUMBER COMPANY, Plaintiff,

vs.

FOURCHE RIVER LUMBER COMPANY, Defendant.

Overruling and Sustaining Motion to Make More Specific.

TUESDAY, *March 29th*, 1910.

On this day defendant's motion to require plaintiff to make its complaint more specific now coming on to be heard, comes plaintiff by its attorneys Mehaffy & Williams and comes defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and the court having heard the argument of counsel and being well and sufficiently advised, and upon plaintiff's offer to amend as to the first ground of said motion to make more specific by inserting the words "unloading switch," doth overrule said motion as to the first, second and third grounds, and doth sustain said motion as to the fourth ground.

And now comes on to be heard the defendant's demurrer to the complaint, and the court after hearing the argument of counsel and being well and sufficiently advised, doth overrule said demurrer.

To which ruling of the court in overruling the motion to make more specific as to the first, second and third grounds thereof, and to overruling the demurrer to the complaint, the defendant at the time excepted and asks that its exceptions be noted of record which is hereby accordingly done; and to the ruling of the court in sustain-

ing said motion to make more specific as to the fourth ground thereof, the plaintiff excepts and asks that its exception be noted of record which is hereby accordingly done.

27 5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER CO., Defendant.

Trial.

On this day comes plaintiff by its attorneys, Mehaffy & Williams and comes defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and this cause now coming on to be heard, both parties announce ready for trial, whereupon a jury of twelve good and lawful men all of the regular panel of petit jurors in this court are duly selected, empaneled and sworn to try the issues of fact arising herein, and after hearing part of the testimony, the hour of adjournment having arrived, further proceedings herein are postponed until tomorrow morning at nine-thirty o'clock and the jurors after receiving the due admonition of the court are permitted to separate until that time.

28 5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Trial.

WEDNESDAY, *April 6th*, 1910.

On this day come the parties hereto by their respective attorneys as on yesterday, and come also the jury empaneled herein and the further trial of this cause is now resumed, and after hearing all the evidence adduced, argument of counsel and instructions of the court the jury retire in charge of the sheriff to consider their verdict, and after the jury have deliberated thereon, by consent of both parties, Henry G. Leiser, one of the jurors in this case is excused from the further consideration of this cause on account of the sudden illness of his father, and by consent of the parties, the eleven remaining jurors are permitted to arrive at a verdict; and after deliberating thereon and having failed to agree upon a verdict, and the hour of adjournment having arrived, the jurors after receiving the due admonition of the court are permitted to separate until tomorrow morning at nine thirty o'clock.

29 5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Verdict & Judgment.

THURSDAY, *April* 17, 1910.

On this day come the parties hereto by their respective attorneys as on yesterday and come also the jury empaneled herein, and the court thereupon instructs the sheriff to conduct the jury to a room that they may further deliberate upon their verdict, and thereupon the jury retire in charge of the sheriff to consider their verdict, and after deliberating thereon return into open court the following verdict, viz:

"We the jury find for the plaintiff and assess the damages at $3978.00.

N. W. CAMPBELL, *Foreman.*"

It is therefore considered, ordered and adjudged by the court that plaintiff, Bryant Lumber Company do have and recover of and from defendant, Fourche River Lumber Company, the sum of Three Thousand Nine Hundred Seventy-eight & no/100 Dollars ($3978.00) for its debt, together with all its costs, expended herein; and that if said judgment and costs be not satisfied within ten days that execution may issue therefor.

And now comes defendant by its attorneys and by leave of court files herein its motion for a new trial of this cause.

30 5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Overruling Motion for New Trial and Granting Appeal.

SATURDAY, *April* 16, 1910.

On this day the motion of defendant for a new trial of this cause, which was heretofore filed herein, now coming on to be heard, comes plaintiff by its attorneys, Mehaffy & Williams and comes defendant by its attorneys, Rose, Hemingway, Cantrell & Loughborough and the court being well and sufficiently advised, doth overrule said motion for a new trial. To which ruling of the court in overruling said motion for a new trial defendant excepts and asks that its exception be noted of record which is hereby accordingly done; and thereupon defendant prays an appeal to the Supreme Court of Arkansas which prayer is by the court granted,

and defendant is allowed ninety days within which time to prepare and present herein its bill of exceptions.

(For motion for new trial see page 182.)

31 5768.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Filing Bill of Exceptions.

TUESDAY, *May* 31*st*, 1910.

On this day comes defendant by its attorneys Rose, Hemingway, Cantrell & Loughborough and presents to the court its bill of exceptions herein and on examination thereof the court finds said bill of exceptions in all things correct and thereupon it is signed by the Judge and the clerk is ordered to file same as a part of the record in this case.

32 In Pulaski Circuit Court, Second Division.

BRYANT LUMBER COMPANY, Plaintiff,
vs.
FOURCHE RIVER LUMBER COMPANY, Defendant.

Bill of Exceptions.

This cause coming on to be heard before the Honorable F. G. Fulk, judge presiding, and a jury empaneled, and the plaintiff appearing by Mehaffy and Williams, its attorneys, and the defendant appearing by George B. Rose, Esquire, and D. H. Cantrell, Esquire, and both sides announcing ready for trial, the following evidence was introduced; exceptions saved and proceedings had as follows, to wit:

The defendant asked and was granted permission to introduce H. W. Morrison, one of its witnesses, out the regular order, as said witness was required to leave town.

33 *Testimony of H. W. Morrison.*

H. W. MORRISON, being first duly sworn and examined testified as follows:

Direct examination.

By Mr. ROSE:

Q. What is your name?
A. H. W. Morrison.
Q. What is your occupation?

A. Assistant Freight Traffic Manager, C. R. I. & P. Ry. Co.
Q. That is commonly called the Rock Island?
A. Yes sir, the Rock Island System.
Q. Did you have jurisdiction—do you have jurisdiction—over the territory embraced in the Rock Island Road from Little Rock west to the Indian Territory line—Oklahoma line, I believe you call it now?
A. Yes sir, freight traffic only.
Q. How long have you held that position?
A. Since January first.
Q. What was your position before that?
A. General Freight Agent.
Q. You then had the same jurisdiction?
A. The same jurisdiction, yes sir.
Q. Your jurisdiction has since been extended, has it not?
A. Yes sir, I have additional authority.
Q. How long have you had jurisdiction of the freight business over the Rock Island in that territory?
A. Ever since the road was constructed.
Q. That was about 1899?
A. We opened our freight traffic December 15, 1899.
Q. You know of the existence of the Fourche River
34 Valley and Indian Territory Railway, do you?
A. Yes sir.
Q. Has your road joint tariffs with that road filed with the Interstate Commerce Commission?
A. Yes sir.
Q. Does that embrace timber and lumber?
A. Especially lumber and timber.
Q. That joint tariff extends to all parts of the country, does it?
A. Wherever there is a commercial demand for a through rate, the rate is made.
Q. Do you allow the Fourche River Valley and Indian Territory Railway Company a division of the freight originating on its line?
A. The Fourche River Valley and Indian Territory Railway Company receives its compensation of the through rate.
Q. Part of the through rate?
A. Yes sir.
Q. That applies to any freight that originates on the line of the Fourche River Valley and Indian Territory Railway?
A. I won't say that, without going into our tariffs because without referring to them I don't know just what is the rule on intra-state Arkansas traffic, my impression is, however, that the rate breaks——
Q. We are dealing in this case only with inter-state traffic?
A. That would be proper, it would have to be published, and they would receive a division of the through rate.
Q. Suppose logs should originate on the Fourche River Valley and Indian Territory Railway to be shipped to a point beyond on

your line, as logs manufactured at that point on your line
35 and shipped out to points outside of the State of Arkansas, would any division of freight be allowed the Fourche River Valley and Indian Territory Railway Company under a shipment of that sort?

A. Not under the present tariffs, no.

Q. Lumber that is shipped on that state of affairs must pay your regular schedule price?

A. It would be necessary for the mill located on the Rock Island Railroad to pay a rate as instructed by the Railroad Commission of Arkansas from the junction up to the mill.

By Mr. WILLIAMS:

Q. You have reference only to intra-state shipments?

A. I am answering that question.

Q. How much would the through rate be on those logs from a mill at a point on the Rock Island Railroad consigned to a destination within the State of Arkansas?

A. That would be an intra-state question.

By Mr. ROSE:

Q. When you ship them out as lumber, what rate would they take?

A. The inter-state published rate applying from that point.

Q. Do you allow in your business any rebates or concessions of that sort?

By Mr. MEHAFFY: We object to that; we are not going to try the railroad for rebating.

By Mr. ROSE:

Q. When the log is shipped into the mill from the Fourche River Valley and Indian Territory Railroad Company that is an Arkansas shipment and governed by Arkansas rates on your road?

36 A. I don't want to lead you to a wrong conclusion on that proposition, my testimony is applying to mills directly on the Rock Island Road, where logs actually originate on the Rock Island Railroad, they would pay in that case—for instance on inter-state lumber shipments we do not apply any milling or territory rates on logs or lumber.

Q. Suppose logs originating on the Fourche River Valley and Indian Territory Railroad, and leaving that road were carried over your line to the mill at what rate would they be carried?

A. Do you want me to answer that generally, or is it a specific case?

Q. Take the specific case of the Bryant Lumber Company at Fourche?

A. There is a reciprocal switching charge in that case; it is a very short distance, for various reasons we desire to have two stations there. It is within switching distance of Fourche Station, for that reason we authorize a reciprocal switching charge, authorized by the Railroad Commission of Arkansas, $2.00 per car.

Q. When that is shipped from the Bryant Lumber Company do you allow the Fourche River Valley and Indian Territory Railroad Company any division or differential?

A. No sir.

Q. Could you be induced to do so?

Mr. MEHAFFY: We object.

Q. Why don't you allow it then?

Mr. MEHAFFY: We object to that. We are suing here on
37 the award of the arbitrators. The Board of Arbitrators have said what we are entitled to.

Cross-examination by Mr. MEHAFFY:

Q. How long have you been granting this division of freight to the Fourche River Valley and Indian Territory Railroad Company?

A. It will be necessary for me to look into the records on that, but from memory I would say that possibly within three or four months after they operated their first train.

A. That is approximately the time?

A. Yes.

Q. What does that amount to?

A. It varies, of course I didn't know, the questions that were going to be asked me, I might have brought a division sheet, and in speaking from memory, it is two cents to Memphis, three cents to Thebes, or St. Louis, and three and one-half cents to Oklahoma points.

Q. That is to say the Fourche River Valley and Indian Territory Railway Company got two cents on Memphis shipments?

A. On the through inter-state rate as published.

Q. That is what I am asking about. They get two cents on Memphis shipments, three cents on Thebes and Cairo, and three and one-half on Oklahoma?

A. Yes. In addition to that, that division varies because there is a difference of the freight rates to every other station.

Q. That is given on lumber originating on the Fourche River Valley and Indian Territory Railway?

A. Out of the through rate published.

Q. It is on lumber which is hauled on the Fourche River
38 Valley and Indian Territory Railway Company's line, sawed at their mill, up there and shipped out into some other State through Fourche—that is from Bigelow?

A. That is right.

Redirect examination.

By Mr. MEHAFFY:

Q. The lumber is shipped from a point on the Fourche River Valley and Indian Territory Railroad, some little distance from your station at the mill of the Fourche River Lumber Company, isn't it?

A. I don't know just how to answer, some little distance; my recollection is it is approximately a mile.

Q. It is shipped out as lumber from the Fourche River Valley & Indian Territory Railroad, in the first instance, before it reaches you?

A. Yes, sir.

Q. You take same as connecting carrier from the Fourche River Valley & Indian Territory Railroad, as lumber?

A. We are connecting carrier, and we take it as that connecting carrier.

Q. The bill of lading is issued by the Fourche River Valley & Indian Territory Railroad at its station, a mile or so from your station?

A. That is my understanding.

Recross-examination.

By Mr. WILLIAMS:

A. It is manufactured, sawed, at the mill on your line?

39 Mr. ROSE: It is not exactly on the line; it is a mile and a half from it.

Q. Wherever the bill of lading is issued from, Bigelow on their line, they get this division?

A. Yes, sir.

Q. Do you know whether or not you have a written contract with these people, or whether that is just based on the tariff rate published with the Interstate Commerce Commission?

A. My information is we have a traffic contract signed between the parties; that is, it is a contract, showing the obligation of each party as to these divisions.

Q. That division is provided for in that contract?

A. Yes, sir.

Q. Is that filed with the Interstate Commerce Commission?

A. I speak advisedly. yes; the filing of a contract with the Interstate Commerce Commission would not be through my office to the Commission; we furnish copies to be filed; the Interstate Commerce Commission only has correspondence with one person connected with the railroad, in connection with a definite subject.

Q. Then that contract is itself operated under by the railroads?

A. We recognize it; yes, sir.

Witness excused.

40 *Testimony of B. Faisst.*

B. FAISST the plaintiff, being first duly sworn and examined, testified as follows:

Direct examination.

By Mr. MEHAFFY:

Q. You are president of the Bryant Lumber Co.?
A. Yes.
Q. Now, I will ask you first about the differentials that you claim should be paid to you by the Fourche River Lumber Company, and that are sued for here, and about which we had the arbitration; I wish you would give, if you have got it, the cars, the amount of lumber shipped, and the amount you are entitled to because of that?
A. Here is a list of the shipments as it was made up to a set time when we first intended to bring suit.
Q. What time is that, do you know?
A. Up to July, 1907; there are a few strag-ling cars beyond that.

By the COURT: Do you want to insert that date in the complaint?
Mr. MEHAFFY: Yes, sir.

WITNESS: There were some cars in September and October.
Q. Up to what is the date now—July, 1907?
A. Yes, sir, there were some cars later on.
Q. Put it up to August then?
A. There were some later ones than that.
Q. What date in August?
A. 1907, there might have been some later cars; the car number and initial and everything is given, so it will be easy to find what it is.

41 Q. Now, how much does that amount to?
A. 13,251,759 lbs., and we only had two cents as a basis; we didn't know how much they were actually getting.
Q. You didn't charge 2 cents to Memphis, 3 cents to Thebes and St. Louis, and 3½ to Oklahoma?
A. No, sir; in fact, we corresponded with them and asked them whether they were receiving anything and they denied it.

Mr. ROSE: We object to the correspondence or talking about the correspondence, unless you produce the letter.
By the COURT: Just simply answer the question that is asked you.

Mr. MEHAFFY:

Q. What does that amount to, figuring the differentials at 2 cents?
A. $2650.35.
Q. That is the amount that you should receive, provided you got 2 cents on the lumber shipped out of the State of Arkansas, over

the Rock Island Railroad, in the manner that Mr. Morrison says the other company ships?

A. Yes; the way we got that figure was at the hearing, at the time of the arbitration; Mr. Hartzel got on the stand and he admitted of two cents, and on parts said he was getting three; that is all he told us; that is the way we got our information; I didn't know for sure that we could figure any more than two cents; we only have the exact figures from Mr. Morrison himself.

Q. Where did these logs come from?

A. From off the line.

Q. Line of the Fourche River Valley & Indian Territory Ry. Co.?

A. Yes.

42 Q. That matter was submittec to arbitration, wasn't it?

A. Yes, sir.

Q. I will ask you if this is the award of the arbitrators?

A. Yes, sir.

Mr. MEHAFFY: I ask permission to introduce this award.

By the COURT: Do you want to read it to the jury now or afterwards?

Mr. ROSE: You read it to them once.

Mr. MEHAFFY: Yes, sir; but it has not been read in evidence.

Mr. ROSE: We will consider it was read in evidence before.

By the COURT: It is made a part of the complaint?

Mr. MEHAFFY: Yes, sir. I want also in this connection to introduce the contract. It may be considered as in evidence?

Mr. ROSE: Yes, sir, I want to call your attention to the fact that in copying it in the complaint, the copying was very defective.

Mr. MEHAFFY: We ask permission to introduce this as the original contract, to be read hereafter?

Mr. ROSE: It is substantially the same as you read it, but there were little errors in it.

Mr. MEHAFFY: The contract is considered in evidence; it can be read later.

Mr. MEHAFFY:

Q. Now, Mr. Faisst, going from that proposition of the differentials, going to the second and third propositions, submitted in the award, the second proposition is the unloading switch

43 on Fourche River; you asked that that be put in at once; the award is that they fix the curve and provided that the switch be put in at once; first take up that second proposition and tell the jury about that; that is, that unloading switch on Fourche River which should be put in at once?

A. The matter of that switch was this way; right soon after we made the contract, we made application to them to have a switch put down, and they had an engineer come out, Mr. Martin from here, to stake it out; they sent us the profile of it, and I saw right away that it never would do to put in such a switch; of course, he had a dump there about twelve feet high; it never would have stayed there, because it is all loose dirt; the rifer would get into it

and nobody would work on it, and besides it would cost four or five thousan- dollars to build; I went over to see them about it and we went on the ground, me and Mr. Neimeyer, and looked over it, and of course, we agreed with Mr. Martin that he wasn't at fault, we had told him to run a switch out there, and he supposed it would have to stay above high water; the intention of the switch is to go down to the water; so the sooner you meet it the better it is. We agreed that the switch should be laid low——

Q. Who agreed, you and Mr. Neimeyer?

A. Yes, sir.

Q. Who was Mr. Neimeyer?

A. He was secretary and treasurer of the Fourche River Lumber Co.

Q. On the strength of that did you go ahead?

A. Yes, sir, we went ahead and built a dump, spent about eleven hundred dollars at it, and we thought it was al- right; we got ties on, and we asked for rails on it, and they had Mr. Martin come out there again, and of course, he found it was entirely different
44 from what he had staked out; of course, we knew that well enough, and of course, we discussed the matter again, and they insisted it would have to be as Mr. Martin originally had laid it; of course, we had never agreed to that, and since it is simply out of reason, we couldn't do it; it wouldn't do any good if we had it that way; we refused to build it that way; this arbitration about it was a little later, sometime later, and as it happened, the dump was pretty well what the arbitration demands.

Q. This controversy arose about the switch before this award?

A. Yes, before that time; anyhow, that is the contention; they just simply asked us to do something which in the first place, would cost an enormous amount of money, and would be no good.

Q. You couldn't unload logs at a twelve foot dump?

A. No, sir, it would be dangerous and wouldn't stay there; the river would get up and the whole thing would slide in the river.

Q. You say this was done before the arbitration?

A. Yes, sir, but after the award of the arbitration, the dump we had already built was in substantial compliance with the award of the arbitrators. It had been washed some in the meantime, but they still insisted on the same thing.

Q. They still insisted it must be built on a level?

A. It was practically level.

Q. State whether or nit they declined to lay the steel provided you built it in accordance with the award?

A. Yes, sir.

Q. The third proposition is the maximum for grades and curvatures, for building switches to be established at once; state whether or not that was done?

A. Of course, that has reference to all the switches; I think there was but one laid in the meantime.
45 Q. This controversy is about one now?

A. Yes, sir, one was laid in the southern part of section 27, and we had made application for them for a year and a half

before, according to the award of the arbitrators; furthermore, they should have put it in inside of twenty days, but as I say, it took about a year and a half to do it, so we wanted another one in the northwest part of 27, and it took them some five or six months to put it in.

Q. Now, you state here that on the first proposition, as part of the award, they not only did not comply with it, but that they removed the track?

A. That was right on the end of the line; if you will give me that map I can point it out.

Q. I think Mr. Rose said they began the mill company's line there, quitting the railroad?

A. The rails were right here; the railroad was there, and we hauled logs there.

Q. Indicate that so the stenographer can get it?

A. It seems to be section—it is right on the line of sections 3 and 4, range 17 west, 3 North.

Q. That you say is taken up now; was that right at the end of the continuation of the Fourche River Valley and Indian Territory Railroad?

A. Yes, sir, as called for by the charter.

Q. State whether or not that was part of the Fourche River Valley & Indian Territory Ry. Co. as called for by the charter?

A. Yes, sir.

Q. And that is part they have taken up?

A. Yes.

Q. Where does the railroad begin, the Fourche River Valley & Indian Territory Railway Co., begin right at the Rock Island
46 Railroad, and comes on by Bigelow?

A. Yes, sir.

Q. Is this red line the railroad?

A. Yes; section 27 runs about three miles from here.

Q. That is supposed to be the railroad?

A. Yes, sir.

Q. It is that part down there that was taken up?

A. Yes, sir, they moved it down here somewheres and used it there; I suppose they called it a logging road or switch or something.

Q. State whether or not that part that was taken up, you have already stated that was a part of the railroad proper that was provided for in the charter, was that within the time that they were required by this contract to build that road, and it was built and taken up?

A. Yes.

Q. You state that you are damaged by reason of that; I wish you would tell the jury just how and in what amount?

A. Well, on that item there is some more; I simply stated the full amount of damages which was sustained by not getting service there at the time; at another place where we were not permitted to load logs right east of this place——

Q. You were not permitted to load logs, do you know whether

or not the Fourche River Lumber Company loaded logs at that place?

A. Oh yes, they moved all the logs.

Q. They had moved theirs and then declined to permit you to load at that place?

A. Yes.

Q. Just tell the jury how much you were damaged by
47 their taking up this track and by their refusal to permit you to load on the track there?

A. By the failure to move our timber, the damage was $1500.

Q. State to the jury whether or not the road taken up, that they claim was a mill road, that extension that was taken up, state whether or not that was necessary for you in order to get your logs in?

A. Certainly.

Q. No other way to get that timber in, but on that road?

A. No.

Q. The third proposition you state that they have refused to comply with the award, by building your switches as provided in the award, and that their failure to do this damaged you; just tell the jury where they have failed; I suppose this one place where they took the road up, they failed to supply you; if there is any other place, just state it; it is stated here that by failure to put in switches or road *as* you could load your logs, you were damaged?

A. Of course, there were these three switches, one at the river and two in those two sections, Section 27 and between sections 3 and 4; we figured that to be $2500.

Q. Now, in going back to the proposition that I first asked you about on that list, now I think that you had each car and the number there?

A. Yes.

Q. And the weight?

A. Yes.

Q. And it amounted to the sum that you gave there?

A. Yes.

Q. Is this entire list correct?

48 A. Yes, one is the list of lumber shipments which they required.

Mr. MEHAFFY: I ask permission to introduce this in evidence. By agreement, it was considered read.

Mr. MEHAFFY:

Q. This contract that has been introduced between the Bryant Co., and the Fourche Co., was entered into as stated, for the purpose of you getting your logs out, and to enable them to build a railroad; had an application been made of your knowledge by the Fourche River Lumber Co. for a charter to build that railroad, prior to this?

A. Yes, sir.

Q. Had it been refused?

A. Yes, sir.

Mr. Rose: We object to that; that has nothing to do with this case.

Mr. Mehaffy: It is the basis of the contract that was entered into and that is sued on here.

Mr. Mehaffy:

Q. At any rate, that contract that has been read in evidence, was entered into by the two mill companies?

A. Yes, sir.

Cross-examination.

By Mr. Cantrell:

Q. Referring to this item of $2650.35, for account of differentials, that is a list of shipments which you have made outside of the State, upon which you have figured a two cent differential, assuming that it should come to you because the Rock Island Road allowed that differential to the Fourche River Valley & Indian Territory Railroad Co.?

49 A. How is that?

Q. You have assumed that two cents should come to you on your shipments, because the Fourche River Valley & Indian Territory Railroad Co. got that division?

A. I haven't assumed that, no; I know they could have got it if they wanted to.

Q. What is the basis of your claim of two cents then?

A. Because they are getting it.

Q. Who is getting it?

A. The Fourche River Valley & Indian Territory Railroad, which are the same people as the Fourche River Lumber Co.

Q. There are two separate and distinct corporations?

A. Yes, sir.

Q. One is a railroad corporation and the other is a lumber company?

A. Yes, sir.

Q. The railroad corporation is controlled and governed by railroad regulations and rules, statutes of the State?

A. I suppose so.

Q. All shipments on the Fourche River Valley Railroad made both for the Bryant Lumber Company and the Fourche River Lumber Co., you say it gets this division of two cents?

A. I don't know that they get it on ours, but they could get it.

Mr. Mehaffy: This is a matter that has been settled by arbitration, and which has been settled by the award of the arbitrators.

Mr. Cantrell:

Q. Your mill is on the main line of the Rock Island Railroad, isn't it?

A. Yes, sir.

Q. And the Fourche River L'b'r Co., is on the line of the

50 Fourche River Valley & Indian Territory Railway Company?

A. Yes, sir.

Q. They are not on the same line of railroad?

A. Yes, sir.

Q. Shipments on the Fourche River Valley & Indian Territory Railway Co. may pass over the Valley road to the connecting carrier, the Rock Island Railroad, and then out into interstate shipments?

A. Yes, sir.

Q. Shipments made by the Bryant Lumber Co. originate on the Rock Island and pass out over the Rock Island's connecting carriers to interstate points?

A. Yes, sir.

Q. Now, Mr. Faisst, you get logs into your mill from various sources, don't you?

A. Yes, sir.

Q. Just describe by what means you get them in there, from what places you get them in?

A. We get some on the river, and we used to get some on the Rock Island; we ain't getting any now.

Q. Some are from the river?

A. Yes, sir.

Q. Some are hauled in by wagons?

A. Yes, sir.

Q. Some come by the Rock Island?

A. Yes.

Q. Any other means you had of getting those logs in there?

A. No.

Q. When those logs were brought in there, what was done with them?

A. Manufactured into lumber.

51 Q. Were they all put together into you- pond?

A. Yes, sir.

Q. Then they were manufactured?

A. Yes, sir.

Q. Then when those logs were shipped out, before they were shipped, they were manufactured into lumber and put in the dry house?

A. Yes, sir.

Q. And after the lumber was dried, then it was shipped out?

A. Yes, sir.

Q. Now, how can you tell on these various shipments that you have charged here on your differential item, which lumber came off of the Fourche River Valley Railroad, and which lumber came by river, or points that were not on the railroad?

A. I don't attempt to tell.

Q. You don't know how to account for that?

A. I don't want to because no one else does; neither does the Fourche River Lumber Co.; it is done all over the country; the very question shows me you don't know anything about that business.

By the COURT: Just answer the question please.

Q. Now, you speak of an unloading switch; you sai- soon after the contract was entered into, you made application to establish an unloading switch; did the Fourche River Valley & Indian Territory Railroad Co. furnish you a profile for the dump?

A. I don't know that it was the Railroad Company; it was the lumber company I think.

Q. Do you know who furnished it?

A. We got a profile from them?

Q. Who did you get the profile from, the lumber company or railroad company?

A. I don't know; to me they are all the same.

52 Q. I understand that; it is to your advantage to have them all the same, but as a matter of fact, do you know from which institution you got the profile?

A. I could look in the papers and see which one wrote the letter, but it is the same people all the time.

Q. When you got that profile, you say you found from that that the dump would be 12 feet high, and not of any service to you?

A. Yes, sir.

Q. You applied to the Board of Arbitration to change that dump?

A. Yes, sir.

Q. When you applied to the Board of Arbitrators, they made a ruling that this dump, that the maximum curve should be a curve of 12 degrees, and the maximum grade of the switches should be 1½%; did this dump comply with this requirement?

A. Practically yes, sir, about.

Q. What do you mean by practically?

A. There might be one spot in it that would exceed 2%, but on an average, it is less, and the curvature is less than it permits.

Q. Have you had an engineer measure your dump to see whether it complies with it?

A. Mr. Marganer.

Q. Is Mr. Morganer a witness here today?

A. I expect him here.

Q. You say that the dump there conformed substantially to the requirements of the award of the Board of Arbitration?

A. Yes, sir; but as I stated, while they were requesting that dump of 12 feet, we would not do anything more on it, unless they signified a willingness to build it down to what was required; as long as they required a 12 foot dump——

Q. A 12 foot dump is in accordance with the requirements of the board, isn't it?

53 A. No, sir.

Q. How does it differ?

A. It is pretty near Level.

Q. Doesn't it require that with 1½% grade?

A. About.

Q. Isn't that pretty near level?

A. Yes, it was pretty near level, that is what we objected to.

Q. Then the dump as provided for by the Board of Arbitration wa-n't satisfactory to you?

A. Yes, but it wasn't satisfactory to me, what they required of me.
Q. They required of you what the Board of Arbitration required?
A. No, indeed not.
Q. You say the dump which was built before you applied to the Board of Arbitration was substantially the same as the Board required?
A. Yes.
Q. Yet you say that dump wasn't satisfactory to you?
A. I said it needed a little trimming up; it was substantially the thing that was required by the Board of Arbitration.
Q. Why did you complain if it was satisfactory to you?
A. Who said I complained? I simply required that the maximum should be established, not particularly for this but for all switches to be put in; of course, on every occasion when you made application for a switch, they would deny it; they made a thousand excuses; they asked us to have a half per cent grade when the main line was four per cent right beside it.
Q. Isn't it a fact that the dump which you built is at a grade of considerably more than 2%?
54 A. No.
Q. Do you know that of your own knowledge?
A. Yes, I was there.
Q. Are you an engineer?
A. I was there with the engineer, and I was there myself; I could measure it myself.
Q. Have you ever furnished the ties for that dump?
A. Yes, sir, paid for the hauling of the ties in there.
Q. Did you ever lay the ties down?
A. They were unloaded right there to be put in.
Q. Have you ever put them in place?
A. As long as they are not willing to put the steel on them, what is the use to put them in place.
Q. Didn't the Board of Arbitration provide that the Railroad Company should not be required—the Fourche Company should not be required to lay its rails until after you had laid the ties?
A. Yes, sir.
Q. You admit you never laid them?
A. The ties are right there, ready for the steel to be placed on them.
Q. Can the steel be laid until the ties are in place?
Q. I have stated already that the ties and everything is ready, whenever they will put them in and will not require a 12 foot dump, then we can trim it up.
Q. What is the length of that switch?
A. I can't tell you now just exactly—about 500 or 800 feet, may be a thousand.
Q. How many ties have you hauled there along by that dump?
A. I think it was two carloads.
55 Q. How many ties were in two carloads?
A. I can't recall; we figured it at the time, that it would be about enough.

Q. Have you any idea how many ties you hauled there?

A. It has been a long time, we had plenty of *times* more we could have brought in, if they had been needed; we had plenty more close by.

Q. Can you tell just how many ties are in a carload?

A. That depends on the car.

Q. Well, in two carloads you hauled there, can you approximate it?

A. It would be guess work, that is all there is to it.

Q. You don't know how many ties *toy* hauled there?

A. No, I d-dn't count them; we counted them at the time, but that has been several years ago.

Q. You don't know whether you hauled enough then to cover that entire switch?

A. I don't know whether it would be exactly enough or more; I knew we had more ready.

Q. It was your opinion that you had enough?

A. Yes, sir.

Q. And it was your intention to bring more if they were needed.

A. Yes, sir, we would have loaded them and brought them right on.

Q. The main trouble with you was they wouldn't slope that switch down so you could get to the river with the logs?

A. Yes, sir, after I had spent all the money, and they let me do it, then they told me they wanted that big dump.

Q. It was necessary to build that big dump in order to make that switch on a grade of 1½%, wasn't it?

56 A. No, sir, indeed not.

Q. What was the highest point on that switch, the highest point of the dump?

A. The one we built or the one that was to be built?

Q. The one that connected with the line of railroad; what was the heighth of the dump at that point, where it connects with the railroad?

A. Where it is connecting now?

Q. Or the proposed switch, the one that was never built?

A. That part was al- right; it is the portion that goes down to the river.

Q. You wanted it when it went back to the river, to slope right straight down, so you run right down to the river?

A. It was to run alongside the river you understand.

Q. What was the heighth of the dump at the place it connected with the railroad?

A. Some four or five feet, but there is no difficulty about that.

Q. Was it any more than four or five feet?

A. I don't think it was more than that.

Q. You wanted it to slope down to an actual level with the ground?

A. I think the dump we made is about two feet high at the end of the dump.

Q. The Fourche River Valley Railroad Co., required that whole

dump to be of practically the same heighth, that is, to come within the 1½% dixed by the arbitrators?

A. No, sir, I have said a half dozen times it was not so; I told you it was about ½%.

57 Q. Do you mean to say if they had built the dump according to your idea, it would have complied with the 1½% grade?

A. At the steepest place, abour 2%, an average of 1½% or less.

Q. You say it would have been within the rulings of the arbitrators, if they had built according to your idea?

A. Yes, sir.

Q. Did you haul these ties there before the arbitrators made their award or afterwards?

A. Before.

Q. Have you ever hauled any ties there since they made their award?

A. No, sir, and I wan't haul any until they tell me they will put it right.

Q. Since the arbitrators rules as to curvatures and per cent of grade, you have never made any effort to put in the dump?

A. As soon as they are ready to put it as the arbitrators said it would be, I will haul all the ties; we spent so much money on it, there is no use to spend any more if they are not going to do anything.

Q. You said in your direct examination, that the dump was 12 feet, didn't you?

A. It was to be according to the profile.

Q. In order to make it on a level with the main line of the railroad?

A. No, sir, not exactly level, but about ½%.

Q. What is the length of that switch?

A. You asked me that already, and I told you I didn't recall e-actly.

Q. Approximately?

58 A. I will just simply have to guess; it has been several years since I was over it.

Q. Do you know whether it was 250 or 5000 feet?

A. It is somewheres along about a thousand; not over two thousand, I am satisfied.

Q. Now, you spoke of certain switches being taken up by the railroad company; the switches you claim were taken up were switches that extended west of the place marked Bellview, were they not?

A. If you want to call them switches. You have a right to call them that, if you please, but that was the main line as chartered.

Q. We will call it the main line if you choose to call it that; at any rate, the rails that had been taken up were rails that had been laid west of Bellview?

A. Yes, sir.

Q. You say that was rails of the Indian Valley Railroad Co.?

A. They were laid down by the Fourche River people; I don't

know whether it was the railroad or lumber company; I never can tell them apart; they never let us know before hand until they got them in.

Q. As a matter of fact, you don't know that the rails that were taken up, whether they belonged to the railroad company or whether they were private tram roads, or private roads of the Fourche River Co.?

A. No, sir, I don't know whether it belongs to Mr. Hartsell as a railroad man or as a lumber company man.

Q. The rails you complain of were taken up west of Bellview?

A. Yes, sir.

Q. The point at which you complain that you were not permitted to load logs, and at which point the Fourche River Valley Lumber Co. did — logs was also west of Bellview?

59 A. Yes, sir.

Q. Did the Fourche River Lumber Co. explain to you they would not allow you to load on that, because it was their private track?

A. I don't know particularly whether they said anything on that particular subject, they usually said that; I asked them about a half dozen places, and they always said this belongs to the lumber company, and they didn't want to let me load.

Q. You knew you had no right to load your logs on the lumber company's tram road, didn't you?

A. I don't know who it belongs to; it is a chartered line, but they say this belongs to the lumber company, or this place belongs to the railroad company; I can't tell the difference.

Q. Didn't you understand and know you had no right to load your logs on the private roads of the lumber company, the tram roads of the lumber company, if it was a private tram road of the lumber company, did you have any right to load on it?

A. My understanding is we can load wherever they load.

Q. Regardless of whether it was the railroad company's line or lumber company's private track?

A. We made the contract with the lumber company to load on their road, and they should get us permission to load on the railroad also.

Q. Isn't it a fact that in every instance where you were refused permission to load at points where the lumber company loaded, it was explained to you that that part of the road was the private train road of the lumber company, and not the railroad of the Fourche River Valley & Indian Territory Railroad Co.?

A. I don't know that it was in ever- case, but they usually say that; it is always the lumber company until they get the

60 timber off, and then it may become the railroad's.

Redirect examination.

By Mr. MEHAFFY:

Q. I wish you would explain to the jury about how your timber was damaged, or how the company was damaged by reason of not

being able to get the timber at where they dug up the switches and failed to build switches out there?

A. A lot of timber we had died and is still dead, rotted at different places.

Q. Had you or not any that you had time limit or options on?

A. I had a contract on a portion of it, and since I couldn't take it, of course, the timber was lost.

Q. Do you mean by that you had to get it out within a certain time under your contract?

A. Yes, sir, of course, we couldn't take it then.

Q. State whether or not you had any timber that was cut or damaged or injured by reason of that?

A. Yes, sir, quite a lot at different placed.

Q. And those two things caused your damage that you claim on that count, is that true?

A. Yes, sir.

Q. Can you tell approximately what amount of timber, whay you lost on the timber that you had a contract for, and couldn't get out by reason of their taking up the track or failing to build the switch?

A. You mean just the amount or the amount of timber?

Q. I mean the amount of your loss or damage?

A. $1500, as I stated already.

61 Q. What was the amount of timber?

A. The amount of timber damaged?

Q. Yes, $1500 is the damaged and decaying timber that you lost?

A. Yes, sir, partly lost and partly damaged, 496,000 feet.

Q. About that unloading switch, that was the switch as I understand, where you anticipated taking the logs to the river and taking them down to your mill by the river?

A. Yes, sir.

Q. What was your damage by reason of their failure to do that?

A. The cost of the switch and ties was $1100.

Q. You actually paid that out?

A. Yes, sir, of course we couldn't get the logs to the river, and float them down; we had to have them switched over on the Rock Island, for which service we put up $2 a car; there were 291 cars on which we were suing, which amounts to $582, which we paid out.

Q. And $1100.00 you paid in building the dump?

A. Yes, sir, and then for switches in section 27, the one on the northwest quarter, that damage was $550, and on the southern part, it was $300.

Q. The reason you did nothing further with that dump, I believe you stated, was that they told you they would not put steel on unless you build it according to that profile, which made it impossible for you to use it?

A. Yes, sir.

Q. And you had everything practically done and had already expended $1100, and you declined to do anything more after they

told you they wouldn't put the steel on unless you made that a twelve foot dump?

A. Yes, sir.

62 Q. You were ready at all times to comply with the award except they told you they wouldn't do it?

A. Yes, sir.

Recross-examination.

By Mr. Rose:

Q. You say you lost some timber that you had a contract right for, and time expired before you could get it out?

A. No, I said I had a contract for it and couldn't get it out.

Q. Had the time expired when you couldn't get it out?

A. The man wouldn't stay any longer.

Q. What do you mean by that?

A. He couldn't deliver the logs, and of course, I couldn't take them, and the contract had to be cancelled.

Q. Had you bought the timber?

A. No, I had not.

Q. What right did you have to the timber?

A. A contract.

Q. Had you a contract for the timber?

A. Yes, just made a contract with them to take it.

Q. In writing? Was the contract in writing?

A. I don't remember whether it is or not; it may be.

Q. Who was your contract with?

A. Albert Finkerbind.

Q. Is he one of your employees?

A. Sometimes he works for us; he has a farm there.

Q. Is he a stockholder in your company?

A. No, sir.

Q. How much timber did Finkbinder contract to sell you?

63 A. About 250,000 feet of timber, which would figure about 225,000 feet; you couldn't get over that on this place.

Q. On whose land was that timber?

A. On his own.

Q. Where was that, what township and range and section?

A. Section 18, range 16 or 17.

Q. Section 16 or range 16?

A. I think range 16.

Q. In what section?

A. 18; he had 120 acres in 6, which is right on the other side of the railroad, which he could have supplied either way——

Q. In section 6?

A. Yes, that was left with me, whichever one he wanted to haul, he could.

Q. How much timber did he contract to deliver to you?

A. Just about 250,000 feet.

Q. He was free to get it from anywhere he pleased.

A. Yes, he has got two pieces there, and of course, he could take it from whichever piece he wanted to.

Q. You say about 250,000 feet, exactly how much was it?

A. We had to settle with him on 250,000 feet, outside of what he had delivered; we made a compromise settlement.

Q. When did you make this contract with Finkbinder?

A. The exact day I couldn't tell you now; of course I could go to the books and find it.

Q. When you couldn't take the stuff, did you pay Finkbinder anything for the logs that were not delivered?

A. Yes.

Q. How much did you pay him?

64 A. We made a lump settlement; in the final settlement, I paid him $500.

Q. For what?

A. For dropping the contract.

Q. For dropping the contract?

A. In settlement, yes.

Q. In money or by check?

A. He was owing me, and of course I deducted part of it.

Q. What was he owing you for?

A. For various matters; he borrowed some money to buy teams; he bought two teams to haul that timber; that was what he owed me for practically.

Q. What became of the teams, did Finkbinder keep them?

A. I think may be he has some of them yet, some died in the course of time, and he may have some yet.

Q. Did he haul any logs under the contract?

A. He hauled some.

Q. How many?

A. I have got it down, 22,000 feet.

Q. Where did he haul them to?

A. Practically all of them to this particular place, which we have been naming, west of Bellview; I think some to another line which ran out to the left of it.

Q. He hauled it to the switch then of the Fourche River Lumber Co.?

A. Yes.

Q. What became of those logs?

A. I don't know; the last time I saw them they were rotting, and I heard they were burnt up in the meantime.

65 Q. Were there any rails on the dump at the time he hauled them?

A. Oh, yes.

(Adjournment from 12 to 2 P. M.)

Redirect examination.

By Mr. WILLIAMS:

Q. By the terms of this contract there were certain things it was agreed each of you should do; among others, the Bryant Com-

pany agrees, first that it will joint with the incorporators of the Fourche River Valley Railway Co., in their efforts to secure a charter for the Fourche River Valley & Indian Territory Railroad Co., in accordance with the articles of association and may heretofore presented to the board, which are now on file with the secretary of State. Did you do that?

A. Yes, sir.

Q. It is agreed that the Fourche River Valley & Indian Territory Railroad Co. when duly incorporated and organized according to law may occupy and enjoy the right of way now occupied by the railroad of the Fourche Company over the lands of the Bryant Company, as hereinbefore set out, and that it will execute the necessary deed of conveyance fully investing said Fourche River & Indian Territory Railroad Company with said right of way for railroad purposes, as soon as the said Fourche River Valley & Indian Territory Railroad Company is duly incorporated and organized? Did you give them the right of way as stipulated in here?

A. Yes, sir.

Q. And it further agrees that the said Fourche River Valley & Indian Territory Railroad Co. shall have a free right of way over the lands of the Bryant Lumber Company, now owned or here-
66 after acquired for the purpose of constructing the unconstructed parts of its road, and that upon the incorporation and organization of the Fourche River Valley & Indian Territory Railroad, the said right of way will be granted to it. Was that complied with?

A. Yes, sir.

Q. And it agrees that the Fourche Company may have the free right of way over the lands of the Bryant Company acquired or to be acquired, for the purpose of building tram roads to reach its timber, but such right of way must be taken so as to not interfere with the construction of operation of the road of the Bryant Company. Have you given them the right of way as they demanded or required it?

A. I don't know whether they have gone over any since; I suppose they took it if they wanted it; they didn't ask for any more; I think they went over one piece.

Q. You didn't decline to allow them the right of way as provided in this contract?

A. No, sir.

Question and answer objected to by Mr. Rose.

Q. Now, I understand you to say that you had figured your differentials on the 2 cent rate based upon information that they gave you, that they were getting 2 cents?

A. Yes.

Q. Did you, prior to the testimony of Mr. Morrison this morning know of their having received any other or further differentials than that?

A. No, sir, our information we got from Mr. Hartsell, that he got 2 cents on timber east of Orchard; we figured it all at 2 cents.

Q. He testified at the time of the arbitration?

67 A. Yes, sir; from Mr. Morrison's testimony this morning, we learned that it is different.

Q. Based upon the 3½ cent differential that Mr. Morrison testified they were getting to Oklahoma points, can you take your list and figure out how much additional you would be entitled to?

A. I just figured the number of cars that went to Oklahoma; 205 went to Oklahoma; a number of cars went to Kansas and Missouri; I don't know the differential on them; if it was the Thebes and Cairo differential, it would be 3 cents.

Q. What would be the difference in the damage you have figured, and as testified to by Mr. Morrison?

A. An exact figure I couldn't give until I figured it up.

Q. You can figure that up later and I will recall you.

Cross-examination.

By Mr. ROSE:

Q. How many cars do you claim differentials on there, how many cars are there in that list?

A. I don't figure the total number; I just figured 205 to Oklahoma points.

Q. How many are there on the list?

A. I haven't added that up yet; I will add that for you; 330.

Q. You said awhile ago that it stopped in 1907, and I notice that there are some cars there as late as June, 1908; were you not mistaken in the year?

A. Which list—the lumber stays at the mill sometimes; of course, it is shipped out later.

Q. I mean the shipments there, you said that embraced 1907?

A. This is the lumber shipments; it may stay at the mill a year.

68 Q. That goes up to June 1908, doesn't it?

A. Yes.

Q. These are all shipments outside of the State, to points outside of the State?

A. Yes, sir, altogether.

Q. How many cars of logs does it take to make a car of lumber?

A. That depends on the size of the car of logs, and the size of the lumber car?

Q. Cars of equal size.

A. You mean thousand for thousand. The logs make a little more than the lumber, according to what you cut; if you cut inch stock, you would expect to get about even; if you cut square stuff, it will equal just as much as it was in the log, as the full log would measure, and you get the siding extra.

Q. In shipping out lumber, doesn't the lumber go close together, packed close together; while the logs are rough; don't you get more than a thousand feet of lumber in the space a thousand feet of logs would occupy?

A. Yes, if you want to crowd it.

Q. Don't you ordinarily?
A. Yes.
Q. What is the average thousand feet in a car of logs?
A. From five to seven; we have put ten thousand feet on a car.
Q. Would it average that much?
A. No, I won't say it would average that much.
Q. How much would it average?
Q. Probably seven or eight thousand.
Q. What is the average of a car of lumber?

A. That depends again on what kind of lumber it is; if it
69 was flooring or dressed stock, it would go up to 15 or 16 thousand feet; of course, the minimum carload is 30,000 lbs.; the weight is given at 30,000 lbs., which would of course make a minimum of 7 or 8 thousand feet.

Q. What would be the average?
A. That depends entirely on what class of work you had; we make a business of cutting timbers largely; we have a mill specially prepared for it, built our mill for that purpose.
Q. Look at your list and see if it is not composed of small stuff nearly; the first is 2 x 14; the next one is 2½ x 12.
A. 2 x 14, I haven't got that on this list; I haven't that list of what was in the cars; we prepared that list especially for you.
Q. 1 x 12, you wouldn't call that timber?
A. No, sir.
Q. 3 x 3 wouldn't be timber?
A. Yes, in a manner.
Q. How many carloads of logs did you receive from the Fourche River Lumber Co.
A. I think it figured up 291 cars.
Q. When did you figure that up?
A. I figured it yesterday, but I testified it this morning.
Q. During what period was that?
A. All that is contained on that list, as I testified this morning; this contains 291 cars.
Q. 291 cars of logs?
A. Yes.
Q. Between what dates, do you know?
A. As I explained this morning, it runs in 1907; I don't think there is any in 1908; the dates are given on each shipment.

70 Q. You mean during the same period that this list of shipments cover?

A. The same period and prior to it; it doesn't give quite the same time as the lumber shipments, which is natural.

Witness excused.
The plaintiff here rested its case.

71 EXHIBIT "A."

Exhibit "A" to Testimony of B. Faisst.

This agreement made this the 3rd day of August, 1905, by and between the Fourche River Lumber Company, a corporation organized and doing business under the laws of the State of Arkansas, hereinafter called the Fourche Company, and the Bryant Lumber Company, a corporation organized and doing business under the laws of the State of Arkansas, hereinafter called the Bryant Company, witnesseth:

Whereas, the Fourche Company has a constructed railroad over and across lands belonging to the Bryant Company, with respect to which controversy has arisen between the parties hereto detrimental to the interests of each, the Fourche Company claiming that the railroad was built on said land under authority from the Bryant Company, and the Bryant Company denying that it gave such authority, and alleging that it was built without authority; and

Whereas, the parties wish to settle their controversies in so far as they affect the future rights of any and all of the parties and their successors as to the building, maintaining and operating a railroad, and the granting of rights of way, hauling freight, etc. and

Whereas, the parties have mutually agreed to settle said controversy upon the terms hereinafter set out;

Now, therefore, said parties, in consideration of the premises and their mutual covenants and agreements made each with the other hereby agree as follows:

1. The Fourche Company will cause to be hauled timber off of all lands now owned by the Bryant Company, as well as off of all lands on which it has acquired timber rights, as the title to said lands and timber rights is shown by the records of Perry
72 County, when loaded on its cars and on its railroads by the Bryant Company, at the rate of 37½ cents per thousand feet.

2. The Fourche Company agrees that for a period of ten years from this date, it will cause to be hauled the timber of the Bryant Company for its mill off of lands which it shall hereafter acquire, or upon which it shall hereafter acquire timber rights, when loaded on its care on its railroad, at a price to be fixed by arbitration, as is hereinafter set out. And the Fourche Company agrees that when loaded cars are received from the Bryant Company they will be carried forward to destination, if consigned to a point on the line of the Fourche River Valley & Indian Territory Railroad, or to the end of its line, if consigned beyon- it, without transfer of freight from one car to another.

3. The Fourche Company agrees that the Bryant Company may build tram-roads or railroads connecting with its railroad and the railroad of the Fourche River Valley & Indian Territory Railroad Company, as now built or hereafter constructed, for the purpose of hauling any timber that it may now own or hereafter acquire, at any place where such tram riad or railroad will not interfere with

the building or operation of the railroad of the Fourche Company, or with a switch or spur track which the Fourche Company had already located; and it will cause to be hauled for the Bryant Company any engines or cars it may desire to use on its road from the Chocta Railroad to its railroad, and when the use of its road is discontinued, the Fourche Company will again cause to be hauled such engines or cars from the discontinued road to any point on its line where the Bryant Lumber Company may have built another road; but the Bryant Company will not be authorized to operate its engines or cars on the line of the Fourche Company.

73 4. The Fourche Company agrees that whenever the Bryant Company desires to build a railroad or tram-road connecting with its road, or the road of the Fourche River Valley & Indian Territory Railroad Company, to reach any timber which it now owns or may acquire, then the Fourche Company will give the right of way over any land that it then owns for the purpose of building such railroad or tram-road; but the same must not in any way interfere with the construction or operation of the railroad of the Fourche Company.

5. This contract is made by the Fourche Company in contemplation of perfecting the incorporation of the Fourche River Valley & Indian Territory Railroad Company, whose articles of incorporation and map are now on filed in the office of the Secretary of State, and of its acquiring and operating a line of road herein referred to; and the Fourche Company agrees that it will pay difference between the price that may be charged by the Railroad Company for hauling the timber now owned or hereafter acquired by the Bryant Lumber Company, and the price fixed for said service by the terms of this contract; and further agrees that said Railroad Company will perform the railroad service for which it herein binds itself.

6. The Fourche Company agrees that it will cause the incorporators of the Fourche River Valley & Indian Territory Railroad Company as soon as they can procure a hearing before the Board of Railroad Incorporations, to renew their application for a charter for the Fourche River Valley & Indian Territory Railroad; that if said charter is granted it will guarantee completion of the construction of the road called for within five years from the date of the charter, and that the work of construction shall progress as rapidly as one-fifth of the part now unconstructed each year, it being understood that if an amount in excess of one-fifth shall be constructed

.74 one year, such excess may be deducted from what the Company is required to construct any succeeding year. It further agrees that the line as constructed shall not vary more than one mile laterally from the preliminary survey now on file in the office of Secretary of State; and that such variation if made shall be in the same valley nor mountains or hills between it and the line of the preliminary survey now on file; that if the variation from the line of the preliminary survey shall be more than a mile in the same valley with no mountains or hills between, at any point where the Bryant Company shall build a connecting switch to reach its timber, it will pay the cost of an additional length of switch that

the Bryant Company is required to build on account of the deviations beyond one mile, or if there is any deviation so that the line as constructed is in a different valley, or on the other side of hills or mountains from the line of the preliminary survey, then it will pay the cost of switches made necessary by the variation from the line as indicated in the preliminary survey, which shall be full satisfaction for any claim the Bryant Lumber Company has on account of said deviation, provided that no claim can be made by the Bryant Company under this provision for building a switch to reach timber purchased by it after it receives notice of where the line of railroad is to be constructed, or which shall not appear to belong to it on the records of the County within ten days after it received notice of where the line of railroad will be constructed, except that, exhibition to the Fourche Company of instruments evidencing acquisition of timber within such ten days shall be equivalent to filing for record, and the railroad shall be constructed on the line indicated in the notice given to the Bryant Company, and it further agrees that with the notice given to the Bryant Company, it
75 will attach an exact map showing the line of railroad.

The Bryant Company agrees:

1. That it will join with the incorporators of the Fourche River Valley & Indian Territory Railroad Company in their effort to secure a charter for the Fourche River Valley and Indian Territory Railroad Company, in accordance with the articles of association and map heretofore presented to the Board and now on file in the office of Secretary of State.

2. It agrees that the Fourche River Valley & Indian Territory Railroad Company, when duly incorporated and organized, according to law, may occupy and enjoy the right of way now occupied by the railroad of the Fourche Company over the lands of the Bryant Company as hereinbefore set out, and that it will execute the necessary deed of conveyance fully investing said Fourche River Valley & Indian Territory Railroad Company with said right of way for railroad purposes, as soon as the said Fourche River Valley & Indian Territory Railroad Company is duly incorporated and organized, and it further agrees that the said Fourche River Valley & Indian Territory Railroad shall have a free right of way over the lands of the Bryant Lumber Company, now owned or hereafter acquired for the purpose of constructing the unconstructed parts of its road, and that upon the incorporation and organization of the Fourche River Valley & Indian Territory Railroad, the said right will be granted to it. And it agrees that the Fourche Company may have the free right of way over the lands of the Bryant Company, acquired or to be acquired for the purpose of building tram-roads to reach its timber, but such rights of way must be taken so as not to interfere with the construction or operation of the road of the Bryant Company.

76 The parties mutually agree:

That the price for hauling future acquired timber of the Bryant Company over the railroad of the Fourche River Valley & Indian Territory Railroad Company, shall be fixed by a board of

Arbitration composed of Judge Robert J. Lea, and two other men, one to be chosen by each of the parties hereto; said board shall have the authority to settle any other differences that may arise between the parties hereto as to the details of carrying out this contract, such as hauling, loading and unloading of timber and other freight, and the time when and the manner in which it is to be done, so that the Bryant Company shall be secured against any discrimination in favor of the Fourche Company in the transaction of its business; and the Fourche Company shall be required to carry timber and other freight equally and impartially without discrimination for or against the Bryant Company. And it is understood that each party shall have such fair and equal opportunities, so they can compete in all respects with each other in the purchase and holding of the lands, timber and other interests in that territory and on and with the railroad. And the Fourche Company agrees that neither it nor the Fourche River Valley & Indian Territory Railroad Company will do any act that will prevent the Bryant Lumber Company from having a fair opportunity to compete with the Fourche Company in all respects in the purchase, holding and sale of lands or timber or the products thereof in that vicinity, or in the transportation of freight over said road; but this shall not preclude the right of the Fourche Company to actively prosecute its mill business or to buy and sell lands and timber or the products thereof as it deems proper. And when said arbitrators shall agree upon the said price, or agree as to any other matter of difference submitted to them as above provided, their
77 decision shall immediately become a part of this contract, binding upon the parties as if originally written herein; and the parties agree that such decision shall be signed by each of them and attached to the original draft of this contract as a part hereof; and to the end that a practical, working arrangement between the parties be made, if any disput or difference arise in interpreting the finding of the Board, the parties agree that such matter shall be referred again for further adjudication or explanation until the decision of the arbitrators is plain, and a practical working arrangement is perfected.

The Board of Arbitrators shall convene at a time and place to be fixed by them of which the Judge who shall preside at its meetings shall give one week's notice to each party.

And it is further mutually agreed by the parties hereto that each shall have the right to cross the other's land for the purpose of removing its own timber, but in so doing, neither party shall interfere with the work of the other nor cut or damage any timber.

The parties agree that they will cause this contract to be ratified by the Board of Directors of their respectice companies within fifteen days from the date of the signing by the Presidents, and the Fourche Company agrees that it will cause this contract to be ratified by the Board of Directors of the Fourche River Valley & Indian Territory Railroad Company within fifteen days from the date of its incorporation as a railroad Company provided such rati-

fication by the Railroad Company shall not bind it to fix the rates fixed by this contract.

No application shall be made to the Board of Railroad Incorporators for the incorporation of the Fourche River Valley & Indian Territory Railroad Company until this contract is ratified by
78 the respective Boards of Directo-s of the Bryant Lumber Company and the Fourche Company as above provided for.

This contract shall not affect or prejudice any actions at law or in equity now pending in the court of the State between any of the parties hereto, their agents, officers or employés, and this contract shall be void unless the charter of the Fourche River Valley & Indian Territory Railroad Company shall be granted by the Board of Railroad Commissioners within sixty days from this date.

FOURCHE RIVER LUMBER COMPANY,
By —— ——, *President.*
BRYANT LUMBER COMPANY,
By —— ——, *President.*

79 EXHIBIT "B."

Exhibit "B" to Testimony of B. Faisst.

On October 24th, 1907, the board met composed of the undersigned arbitrators, and the Bryant Lumber Company made the following demands:

First. That the Bryant Lumber Company be permitted to load logs on the Fourche River Valley & Indian Territory Railroad on all places where the Fourche River Lumber Company have loaded and are loading logs and on all places which have a grade and curvature not exceeding such grades and curvatures as the Fourch- River Lumber Company have been and are loading from.

Second. That the unloading switch on the Fourche River be put in at once.

Third. That the maximum for grades and curvatures for the building of switches be established at once.

Fourth. That the Fourche River Lumber Company through the Fourche River Valley & Indian Territory Railroad Company shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same freight concessions that are now enjoyed by the Fourche River Lumber Company, through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company.

The arbitrators grant the first demand with the proviso that all cars be loaded between 4 p. m. and 9 a. m. of the next day.

On the second and third propositions the Board rule that the maximum curve shall be 12 degrees and the maximum grade of switches be 1½ (one and one-half per cent) except where there is a reversed curve, where it may be two per cent, and that the
80 Fourche River Lumber Company be required to lay the iron on the unloading switch at Fourche River whenever the ties are laid and these grades and curves are conformed to.

This and all other switches are to have proper rises and dumps at the end to prevent cars running off.

The Fourche River Lumber Company protests against the arbitrators taking jurisdiction of the fourth proposition on the ground that it is beyond the terms of the submission; but the board (Mr. Grayson dissenting) overruled the objection, and rules that the Fourche River Lumber Company be required to pay to the Bryant Lumber Company the same differentials the Fourche River Valley & Indian Territory Railway receives on interstate shipments of the Fourche River Lumber Company; to which ruling the Fourche River Lumber Company excepts.

ROBERT J. LEA.
W. GRAYSON,
C. W. LEWIS.

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EXHIBIT "C."

Exhibit "C" to Testimony of B. Faisst.

December, 1905.

W. B.	Initials.	Number.	Weight.	
12- 9.	C. R. I.	90051	34,000 lbs.	
12- 9.	C. R. I.	90568	34,000 "	170,000
11- 6.	C. R. I.	12000	102,000 "	

January, 1906.

1- 2.	C. R. I.	15283	34,000 "	
1- 2.	C. R. I.	15009	34,000 "	
1- 2.	C. R. I.	90627	34,000 "	
1- 3.	C. R. I.	14223	34,000 "	
1- 3.	B. C. R. & N.	1055	34,000 "	
1- 3.	St. L.	20344	34,000 "	
1- 6.	St. L.	20344	34,000 "	
1- 8.	C. R. I.	16283	34,000 "	
1- 8.	C. R. I.	14223	34,000 "	
1- 9.	C. R. I.	90627	34,000 "	
1- 9.	B. C. R.	1055	34,000 "	
1- 9.	C. B. I.	15009	34,000 "	
1-13.	S. & N.	20344	34,000 "	
1-13.	B. C. R. & N.	1494	34,000 "	
1-13.	C. R. I.	14904	34,000 "	
1-13.	B. C. B. I.	1227	34,000 "	
1-13.	C. R. I.	90290	34,000 "	
1-23.	C. R. I.	90629	34,000 "	
1-23.	C. O. & G.	9324	34,000 "	
1-30.	C. O. & G.	9302	34,000 "	
1-30.	S. & N. W.	44111	34,000 "	
1-30.	B. C. R. & N.	1045	34,000 "	
1-30.	C. O. & G.	9324	34,000 "	816,000

82

1-30.	C. R. U.	90,629	34,000 lbs.	

February, 1906.

2- 1.	K. C. S.	9302	34,000	"	
2- 1.	C. R. I. & P.	15933	34,000	"	
2- 1.	C. & N. W.	44111	34,000	"	
2- 1.	C. R. I.	90430	34,000	"	
2- 3.	C. O. & G.	9165	34,000	"	
2- 3.	C. O. & G.	9222	34,000	"	
2- 3.	C. R. I. & P.	90686	34,000	"	
2- 6.	C. R. I. & P.	90310	34,000	"	
2- 6.	C. O. & G.	9324	34,000	"	
2- 6.	B. C. R. & N.	1045	34,000	"	
21- 6.	C. O. & G.	9222	34,000	"	
2-16.	B. C. R. & N.	1045	34,000	"	
2-16.	C. R. I. & P.	90666	34,000	"	
2-16.	C. O. & G.	9163	34,000	"	
2-21.	C. R. I.	90645	47,412	"	
2-21.	C. R. I.	5117	43,495	"	
2-21.	C. R. I.	15647b	42,070	"	
2-21.	C. R. I.	15271	34,000	"	
2-12.	C. R. I.	61559n	34,649	"	
2-12.	B. C. R.	1045	39,958	"	
2-22.	C. R. U.	12396	35,232	"	
2-23.	C. O. & G.	9084	47,336	"	
2-24.	C. R. I.	15341	46,860	"	
2-24.	C. R.	15354	36,270	"	883,272

March, 1906.

3- 2.	C. R. U.	90645	60,537	"	
3- 2.	C. R. I.	5331	40,324	"	
83					
3- 2.	C. R. I.	15647	40,732	lbs.	
3- 8.	B. C. R. & N.	1065	47,719	"	
3- 9.	C. O. & G.	8985	62,160	"	
3-13.	C. C. R. & N.	1065	34,000	"	
3-15.	C. R. I.	15331	44,837	"	
3-17.	C. O. & G.	8311	34,000	"	
3-16.	C. O. & G.	8985	47,280	"	
3-16.	C. R. I.	14925	39,620	"	
3-16.	C. R. I.	15345	50,500	"	
3-20.	C. O. & G.	8985	58,700	"	
3-20.	C. R. I.	14925	46,200	"	
3-21.	N. O. & N. E.	11172	34,000	"	
3-21.	C. R. I.	14916	34,000	"	
3-21.	C. R. I.	15345	52,851	"	
3-21.	C. R. I.	15331	46,002	"	
3-21.	B. C. R. A. N.	1065	41,871	"	
3-21.	C. R. I.	15036	34,000	"	932,644
3-27.	C. R. I.	15010	41,916	"	
3-27.	C. R. I.	15331	41,395	"	961,360

April, 1906.

4-26.	C. O. & G.	8985	4,207	"	
4-25.	C. R. I. & P.	14006	51,790	"	
4-25.	C. R. I.	15010	34,000	"	
4-23.	C. R. I.	14925	47,022	"	
4-23.	C. R. I.	90209	40,300	"	
4-23.	C. R. I.	15522	39,580	"	
4-21.	V. C.	1065	34,000	"	
4-21.	C. R. I.	15036	48,460	"	

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4-21.	C. R. I.	14916	54,540	lbs.	
4-21.	C. R. I.	15331	44,574	"	
4-30.	C. R. I.	15522	49,400	"	
4-31.	C. R. I.	90209	51,650	"	
4-30.	C. R. I.	14916	47,740	"	
4-30.	B. C. R. & N.	1069	42,230	"	
4-13.	B. C. R. & N.	1065	34,000	"	
4-13.	C. R. I.	15345	37,070	"	
4-13.	C. R. I.	15331	37,310	"	
4-11.	C. R. I.	14006	34,000	"	
4-11.	C. R. I.	15010	36,230	"	
4-11.	C. R. I.	14316	49,340	"	
4- 3.	C. R. I.	14916	34,000	"	
4- 3.	C. R. I.	15331	45,180	"	
4- 3.	C. R. I.	15010	45,300	"	
4- 6.	C. R. I.	15036	34,000	"	
4- 6.	C. R. I.	25345	34,000	"	
4- 6.	T. & P.	869	45,550	"	
4- 6.	C. R. I.	15522	45,550	"	
4- 6.	B. C. R.	1065	38,650	"	
4- 7.	C. R. I.	14925	51,620	"	
4- 7.	C. R. I.	90209	43,060	"	
4- 7.	C. O. & G.	8985	61,300	"	
4-16.	C. R. I.	90209	54,840	"	
4-16.	C. O. & G.	14925	59,000	"	
4-16.	C. R. I.	15522	50,524	"	
4-19.	C. R. I.	8985	67,680	"	
4-19.	C. R. I.	15345	40,188	"	
4-19.	C. O. L. & G.	15036	54,760	"	1,674,925

85 May, 1906.

5-15.	F. R.	36	45,764	lbs.
5-16.	F. R.	30	42,933	"
5-16.	F. R.	42	39,593	"
5-26.	F. R.	44	36,006	"
5-17.	F. R.	40	44,450	"
5-17.	F. R.	36	38,760	"
5-19.	F. R.	30	43,469	"

5–19.	F.	R.	34	49,980 "	
5–19.	F.	R.	42	43,996 "	
5–24.	F.	R.	38	43,237 "	
5–24.	F.	R.	44	51,442 "	
5–25.	F.	R.	40	50,634 "	530,264

June, 1906.

6– 4.	F.	R.	38	54,476 "	
6– 4.	F.	R.	44	49,810 "	
6– 6.	F.	R.	40	56,091 "	
6– 6.	F.	R.	36	50,192 "	
6–11.	F.	R.	32	64,115 "	
6–11.	F.	R.	38	56,160 "	
6–11.	F.	R.	30	43,707 "	
6–12.	F.	R.	44	40,808 "	
6–13.	F.	R.	36	44,531 "	
6–12.	F.	R.	12	34,000 "	
6–12.	F.	R.	40	51,025 "	
6–13.	F.	R.	14	34,552 "	
6–18.	F.	R.	30	49,444 "	
6–19.	F.	R.	44	56,644 "	
6–19.	F.	R.	36	41,641 "	

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6–20.	F.	R.	14	36,057 lbs.	
6–21.	F.	R.	40	54,128 "	
6–21.	F.	R.	12	24,000 "	
6–26.	F.	R.	44	59,942 "	
6–28.	F.	R.	30	38,896 "	
6–28.	F.	R.	44	35,122 "	
6–29.	F.	R.	38	72,666 "	1,049,707

July, 1906.

7– 5.	F.	R.	44	61,300 "	
7– 7.	F.	R.	12	43,273 "	
7– 7.	F.	R.	40	40,621 "	
7–11.	F.	R.	30	45,857 "	
7–11.	F.	R.	14	34,630 "	
7–16.	F.	R.	40	42,007 "	
7–16.	F.	R.	12	34,000 "	
7–16.	F.	R.	38	34,000 "	
7–18.	F.	R.	44	59,104 "	
7–18.	F.	R.	30	36,500 "	
7–18.	F.	R.	14	34,000 "	
7–20.	F.	R.	38	55,105 "	
7–21.	F.	R.	12	19,992 "	
7–24.	F.	R.	40	59,228 "	
7–25.	F.	R.	38	44,973 "	
7–25.	F.	R.	30	48,247 "	

7–26.	F.	R.	44	50,048 "	
7–28.	F.	R.	40	59,678 "	
7–26.	F.	R.	14	48,033 "	
7–30.	F.	R.	12	45,381 "	
	Total				894,977

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8–28.	F.	R.	44	52,400 lbs.	
8–24.	F.	R.	12	36,000 "	
8–24.	F.	R.	42	43,500 "	
8–24.	F.	R.	36	44,500 "	
12–21.	F.	R.	36	51,600 "	
12–21.	F.	R.	44	51,000 "	
12–21.	F.	R.	34	46,700 "	
10–11.	F.	R.	26	48,244 "	
9–21.	F.	R.	44	46,700 "	
9–14.	F.	R.	14	40,000 "	
9–14.	F.	R.	38	40,000 "	
9–14.	F.	R.	36	40,000 "	
12–21.	F.	R.	30	58,600 "	
12–12.	R.	R.	30	54,100 "	
12–22.	F.	R.	41	42,200 "	
12–28.	F.	R.	42	72,670 "	
10– 8.	F.	R.	1051	52,000 "	
10–11.			15104	48,800 "	
12–28.	F.	R.	56	73,710 "	
12– 5.	F.	R.	34	47,000 "	
12– 5.	F.	R.	12	28,200 "	
12– 8.	F.	R.	40	28,500 "	
12–30.	F.	R.	42	43,680 "	
11–30.	F.	R.	40	30,440 "	
11–30.	F.	R.	34	37,000 "	
11–30.	F.	R.	44	41,800 "	
11–30.	F.	R.	36	42,800 "	
11–30.	F.	R.	30	46,100 "	
12– 5.	F.	R.	14	22,800 "	

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11–16.	F.	R.	30	55,500 lbs.	
11–15.	F.	R.	38	40,800 "	
11–16.	F.	R.	42	54,000 "	
11–15.	F.	R.	36	46,800 "	
11–15.	F.	R.	40	46,800 "	
10–30.	F.	R.	42	50,000 "	
9–22.	F.	R.	36	40,000 "	
9–22.	F.	R.	12	40,000 "	
9–22.	F.	R.	40	49,100 "	
10–19.	F.	R.	..	45,500 "	
10–19.	F.	R.	40	44,800 "	
10–19.	F.	R.	14	45,500 "	

10-19.	F. R.	38	47,100	"	
10-12.	F. R.	36	40,000	"	
10-16.	F. R.	42	43,500	"	
10-16.	F. R.	44	45,100	"	2,067,944

X 1907. X

2-21.	F. R.	30	54,000	"	
2- 2.	F. R.	34	50,200	"	
2- 2.	F. R.	36	51,600	"	
2- 6.	F. R.	40	57,780	"	
2- 4.	F. R.	44	55,300	"	
3-21.	F. R.	30	58,200	"	
3-21.	F. R.	36	49,000	"	
3-12.	F. R.	40	61,400	"	
5- 5.	F. R.	38	52,200	"	
4- 5.	F. R.	30	47,400	"	
11-12.	F. R.	30	58,500	"	

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3-30.	F. R.	34	54,200	lbs.	
3-30.	F. R.	38	57,200	"	
9-16.	F. R.	34	50,000	"	
10-14.	F. R.	38	40,000	"	
10- 1.	F. R.	40	36,300	"	
9-17.	F. R.	30	50,000	"	
9-19.	F. R.	36	50,000	"	
9-27.	F. R.	44	50,000	"	
10-22.	F. R.	40	50,200	"	
9-27.	F. R.	38	50,000	"	
10-29.	F. R.	44	50,000	"	
2-19.	F. R.	34	46,800	"	
7-16.	F. R.	34	61,280	"	
2-18.	F. R.	38	45,700	"	
4- 2.	F. R.	36	55,900	"	
4- 2.	F. R.	40	52,300	"	
2-23.	F. R.	68	52,200	"	
2-23.	F. R.	67	49,800	"	
3-12.	F. R.	38	68,100	"	
3- 8.	F. R.	42	52,000	"	
3- 9.	F. R.	34	69,900	"	1,798,960
4-12.	F. R.	34	57,100	"	
4-12.	F. R.	40	54,400	"	
7-10.	F. R.	30	47,000	"	
1-10.	F. R.	40	65,000	"	
1- 9.	F. R.	38	62,500	"	
1- 9.	F. R.	44	58,900	"	
1-24.	F. R.	38	56,300	"	
1-19.	F. R.	44	45,600	"	
1- 2.	F. R.	40	51,400	"	

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1–19.	F.	R.	30	52,200 lbs.	
1– 2.	F.	R.	36	49,240 "	
4–24.	F.	R.	36	57,750 "	
4–18.	F.	R.	30	51,600 "	
4–22.	F.	R.	38	54,980 "	
5– 1.	F.	R.	34	40,100 "	
5– 1.	F.	R.	40	57,500 "	
4–30.	B.	& O.	54511	38,300 "	
2–22.	F.	R.	61	48,200 "	
4–18.	F.	R.	44	45,560 "	
1–16.	F.	R.	34	56,100 "	
3– 9.	F.	R.	36	61,600 "	
1–16.	F.	R.	35	41,300 "	
1–15.	F.	R.	36	55,400 "	
1–15.	F.	R.	42	50,000 "	
7– 1.	F.	R.	38	40,000 "	
8–29.	F.	R.	36	55,200 "	
2– 2.	F.	R.	40	55,500 "	
5–27.	F.	R.	44	49,000 "	
5–15.	F.	R.	38	50,400 "	
5–15.	F.	R.	40	51,000 "	
5–15.	F.	R.	36	46,000 "	
8–14.	F.	R.	40	40,000 "	
7–31.	F.	R.	38	49,600 "	
11– 1.	F.	R.	34	35,000 "	
5–14.	F.	R.	30	43,000 "	
11–25.	F.	R.	30	60,100 "	
5–15.	F.	R.	44	51,900 "	
5– 7.	F.	R.	34	55,000 "	
5–20.	F.	R.	30	39,000 "	

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5–24.	F.	R.	36	42,500 lbs.	
7–25.	F.	R.	34	33,500 "	
11– 5.	F.	R.	44	50,000 "	
11–18.	F.	R.	31	50,000 "	
8– 9.	F.	R.	36	46,900 "	
6– 6.	F.	R.	30	45,400 "	
6– 5.	F.	R.	38	57,900 "	
2–19.	F.	R.	36	63,600 "	
3– 4.	F.	R.	40	59,400 "	
3–27.	F.	R.	40	53,900 "	
				..... "	2,415,030
3– 4.	.....		..	..... "	2,406,130
6–21.	F.	R.	40	44,700 "	
					13,251,739

92 1-1-1906.

1- 9.	Wabash #23058: 2 x 14—26	12,133	feet.
1-11.	C. R. I. #15293: 2½ x 12—16—3 x 12—4	11,150	"
1-17.	B. C. B. R. & N. #1494: 6 x 14—10 x 14—8—14—6 x 16—20	7,620	"
1-19.	K. C. S. #15893: 3 x 3—3 x 4—3 1—4 x 4¼—2½ x 10—12	17,164	"
1-19.	K. C. S. #1271: 2 x 4, 2 x 8, 2 x 12, 2 x 10, 2 x 14 10, 14, 16	13,599	"
1- 5.	C. R. I #90112: 2 x 4—26	11,708	"
1-25.	C. B. & Q. #32556: 1 x 4, 1 x 3 flooring	13,948	"
1-25.	C. R. I. & P. #170092: Ceiling, Flooring, drop siding, finish, mldg	19,015	"
1-26.	C. R. I. #55115: 1 x 12, 1 x 10, 1 x 6, 1—8—1¼ x 10 any length	15,768	"
-37.	C. R. I. #15029: 6 x 14, 10 x 14—8—14, 6 x 16	7,988	"
1-31.	C. R. I. #14204: 3 x 3, 3 x 4 el—4 x 4¼, 3 x 6, 2 x 4 B. & B	18,613	"
1-31.	Mo. P. #7714: 1 x 8, 1 x 4, 1 x 6, 1 x 12, 1¼ x 8½ x 12 rough finish	15,558	"
2- 1.	M. E. & P. #25097: 3 x 12, 8 x 10, 6 x 8, 2 x 12	12,139	"
2- 2.	L. & N. #5877: 1 x 12—10—12—14—16—180 20.	15,736	"
2- 3.	C. O. & G. #9048: 2 x 4, 2 x 10, 2 x 12—10 to 20′ long	11,587	"
2- 3.	C. & E. I. #6066: 2 x 8, 2 x 10, 2 x 14—20—22—26, 30′ long	12,536	"
2- 5.	St. L. I. M. & S. #13312: 2 x 4, 2 x 6, 2 x 8, 2 x 12—10 to 20	26,159	"
93			
2- 6.	C. R. I. #51721: 1 x 8, 1 x 10, 8 to 20′ shiplap	13,777	feet.
2- 9.	I. C. #12684: 1 x 8, 1 x 10, 10 to 20′ shiplap	13,459	"
2-13.	St. L. & M. S. #43668: 1 x 12, 8,000 M Shingles	6,780	

2–13.	C. R. I. & P. #15648: 2 x 14, 226	13,650	"
2–20.	C. O. & G. #9222: 6 x 16—6—14—20	8,380	"
2–27.	K. C. & S. #2161: 1 x 8, 1 x 10 shiplap	14,461	"
2–27.	M. C. R. R. #46771: 1 x 6, 1 x 8, 1 x 10, 1 x 12, 10 to 18′	19,639	"
2–27.	C. R. I. & P. #15251: 2 x 12, 2 x 6, 2 x 4, 4 x 12, 3 x 12 16 to 24	12,174	"
2–28.	S. E. #17828: 1 x 10—12, 12 to 20 feet	19,661	"
3 –3.	C. R. I. & P. #12396: 2 x 4, 2 x 10, 2 x 6, 2 x 8, 1 x 12, 1 x 8	14,094	"
3– 6.	S. P. A. L. #10: 2 x 14, 2 x 12—18—22—24 ft. long	13,982	"
3– 7.	P. R. R. #95335: 6 x 14, 12 x 16—14—16′ long	8,736	"
3– 9.	N. & W. #28814: 2 x 4, 2 x 6, 2 x 8	11,784	"
3–10.	C. R. I. & P. #54774: 1 x 14, 1 x 12—1 c 4 flooring 2 x 4, 2 x 6, 2 x 8	17,574	"
3–12.	St. L. & S. F. #34739: 2 x 12, 2 x 6, 2 x 4, 2 x 40—8—10 16 to 24	16,562	"
3–14.	C. E. & I. #61826: 5 x 14, 6 x 16—20′	8,620	
3–20.	C. R. I. #C. R. I. #11128: 2 x 7, 2 x 10, 2 x 12, 6 x 6, 3 x 6, flooring	18,252	
94			
3 –20.	C. B. & Q. #23280: 1 x 4 fig. 1 x 10 shiplap, ceiling casing	18,957	feet.
3 –30.	P. C. C. & S. #16390: 6 x 6, 8 x 8, 4 x 6, 3 x 8, 14—10 to 24′	14,330	"
3026.	I. M. #4021: 2 x 6, 2 x 4, Bevel Siding ceiling, fig.	17,801	"
3–28.	Mo. P. #19556: 3½ x 6½, 3½ x 8—12	12,950	"
3–31.	S. L. & S. F. #51366: 3 x 12, 3 x 6, 2 x 4, 4 x 4, 2 x 6, 19, 14, 18	11,464	"
4– 3.	L. & N. #23901: 2½ x 10—16	19,533	"

4- 4.	C. R. I. #6151: 1 x 8 shiplap, 1 x 12, 1 x 4 flooring..	18,175	"
4- 4.	N. Y. S. & St. L. #15386: 2 x 6, 2 x 4, 2 x 5, 2 x 8, 3 x 4—13—14—16	14,761	"
4- 6.	G. T. #12145: 1 x 6, 1 x 8, 1 x 12, 1¼ x 8 1¼ x 12, finish	17,598	"
4- 7.	C. R. I. #15045: 2 x 8, 3 x 8, 2 x 6, 3 x 4, 4 x 4, 2½ x 6, 10, 12 and 16 feet long.....	14,650	"
4- 7.	C. R. I. #57307: 2 x 6, 2 x 8, 2 x 4, 2 x 12, 1 x 6 shtg., 1 x 10 shiplap, 1 x 4 bridging	22,093	"
4-12.	C. R. I. #4993: 3 x 3, 3—1, 4 x 4¼, 2 x 4, 2 x 6, 12, 14—18'	14,256	"
4-14.	C. R. I. #9492: 3—6, 2½ x 6, 3¼ x 3½, 2 x 6, 14, 16, 20'	13,500	"
4-16.	T. & P. #896: 3 x 14—6—14—8—14—2 x 12, 6 x 16	12,307	"
4-17.	C. R. I. & P. #15724: 2 x 12, 2 x 10, 2 x 6, 2 x 4.....	13,737	"
4-19.	Big Four #6294: 2½ x 10, 3¼ x 4¼, 2 x 6, 3 x 4, 3 x 3, 2 x 4, 2 x 3—10, 12, 14, 16, 18'	16,861	"
4-21.	D. C. R. & N. #13008: 1 x 6, 1 x 8, 1 x 10, 1 x 12 rough finish	20,003	"
95			
4-24.	C. R. I. #51765: 1½ x 8, 2 x 8, 3 x 8, 4 x 4, 2 x 6 finish	13,588	feet.
4-25.	B. C. R. & N. #1412: 4 x 12—24, 3 x 12—16.....	13,920	"
4-25.	C. R. I. #57099: 2 x 12—16.....	16,704	"
4-25.	C. R. I. #5911: 1 x 7, 1 x 11, 1 x 12, 1 x 10, 1 x 6, 4 x 5½, 4 x 6½.....	13,212	"
4-26.	C. R. I. #5822: 1 x 6, 1 x 8, 1 x 10, 1 x 12, 1 x 14 rough finish.....	11,398	"
4-27.	I. C. #33373: 2 x 5, 2 x 8, 2 x 6, 2 x 4, 3 x 4, 3 x 3	21,001	"

4–28.	T. & P. #11412: Bevel siding, ceiling, star flooring, 2 x 4, 1 x 12, 1 x 4.....	13,603	"
4–30.	B. C. R. N. #1227: 2 x 6, 2 x 14—12, 14, 24, 26 ft....	10,268	"
5– 1.	C. B. #2056: 1¼ x 6, 1¼ x 8, 1¼ x 10, 1¼ x 12, 1½ x 12, 1½ x 8, 1½ x 10, 1½ x 12, 2 x 12, 2 x 10, 2 x 8, 2 x 6 rough finish	12,252	"
5– 7.	C. R. I. & P. #15036: 12 x 15—14—6—14—16—13—6.	13,664	"
5– 7.	C. R. I. & P. #587: Ceiling 1 x 12, 1 x 8, 1 x 3.....	14,237	"
5– 9.	C. R. I. #9126: 2 x 6, 2 x 12, 2 x 4, 2 x 6, 1 x 12, 1 x 8 shiplap, 1 x 4, 1 x 12.....	11,240	"
5– 8.	B. C. R. & N. #3071: 1¼ x 4, 1¼ x 6, 1¼ x 10, 1¼ x 12, finish, 2 x 4, 1 x 10, 1 x 8, 1 x 6, sheeting, 2 x 4, 2 x 12, 2 x 6, gun moulding, 2 x 12, 2 x 10 cypress.	16,765	"
5–13.	C. O. & G. #15335: 2 x 14, 2 x 6—25.....	16,293	"
5–17.	St. L. & S. W. #2983: 4 x 6, 6 x 6–4 x 4, 6 x 8, 8 x 10, 8 x 8, 8 x 10, 2 x 14.....	12,057	"
96			
5–21.	C. R. I. #170273: 2 x 12—16—18—20, 22, 24, 2 x 14–14	16,243	feet
5–21.	C. O. & G. #5809: 2 x 6, 3 x 6, 3 x 8, 4 x 6 S4S.....	13,275	"
5–22.	C. O. & G. #4236: 2 x 10, 2 x 12, 2 x 6.....	12,030	"
5–22.	C. O. & G. #11184: 3 x 4, 2 x 6, 3 x 8, 2 x 8, 1¼ x 8, 2½ x 6, 4 x 4, 10, 12, 16' long..	15,126	"
5–23.	C. O. & G. #3803: 3 x 12, 14 and 16 ft.....	10,428	"
5–28.	C. O. & G. O. #56020: 1 x 4 flooring, ⅝ x 4 ceiling, 1 x 4 partition	20,955	"
5–30.	C. R. I. & P. #5193: 3½ x 6½, 12, 3½ x 8, 12.....	10,476	"
5–30.	C. R. I. & P. #61,597: 3 x 8, 8 x 10, 3 x 8, 2 x 12, 2 x 4, 3 x 12, 16, 18, 20, and 24 feet..	17,062	"
5–30.	B. & M. #2700: 1 x 6, 1 x 10, 1¼ x 12, finish, 1 x 6, 1 x 8, 1 x 10, 1 x 12, 2 x 6, 2 x 8, 2 x 12	11,775	"

6- 5. C. R. I. #5533:
1 x 4, 12 rough..... 9,980 "

6- 6. C. R. I. #2398:
1 x 12, 2 x 4, 2 x 6, 1 x 8 shiplap, 1 x 6 drop siding, 1 x 6 flooring. 11,440 "

6- 7. C. R. I. #6708:
1 x 4 flooring, 5/8 ceiling..... 17,661 "

6-11. C. O. & G. #54,447:
2 x 12, 2 x 10, 2 x 6, 6 x 10, 6 x 6.. 13,713 "

6-12. C. R. I. #86428:
4 x 14, 2 x 12, 2 x 14, 2½ x 16.... 10,362 "

6-13. C. R. I. #83,435:
2 x 6, 2 x 8, 22, 24 and 26, 28 ft. long ..... 11,471 "

6-13. C. O. & G. #10516:
2 x 6, 2 x 14, 2 x 8, 2 x 4, 1 x 6, 1 x 8 shiplap ..... 15,976 "

6-22. St. L. & S. F. #13372:
1 x 6, 1 x 3, 4 x 10, 4 x 6½, 4½ x 8, 3½ x 6½, 4½ x 6, 4 x 5½, 3 x 4 ..... 16,479 "

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6-22. C. R. I. #350105:
2 x 6, 2 x 4, 1 x 4, 1 x 6, 1 x 8, 1 x 10, 1¼ x 6, 1¼ x 8, 1¼ x 10, 1¼ x 12..... 15,456 feet.

6-26. C. R. I. & P. #2561:
2 x 8, 2 x 4, 2 x 6..... 16,335 "

6-26. C. R. I. & P. #86022:
2 x 14—20 rough..... 11,200 "

6-27. B. C. R. & N. #2029:
1 x 4, 10, 12, 14, 12, and 18 ft. long 16,952 "

6-29. C. R. I. & P. #6958:
30 M. Prime Shingles, 80; shingles.

7- 2. R. I. #54007:
110,000 Best shingles.....

7- 2. C. O. & G. #4394:
3 x 12, 16, 3 x 8, 24, 4 x 12, 24.... 10,704 "

7- 3. C. R. I. & P. #58698:
66 pcs. 3 x 12—14..... 2,772 "

7- 3. R. I. #53230:
110,000 Prime shingles.....

7- 4. K. C. F. S. & M. #22078:
2 x 6, 2 x 4, 1 x 12, 1 x 8, 1 x 4, 1½ x 6 ..... 20,703 "

7- 6. C. R. I. & P. #52018:
2 x 8, 1½ x 7, 3 x 4, 2½, 6, 3 x 8 2 x 6 ft..... 9,984 "

7- 7. R. I. #7550:
80 M. Economy's. 30 M. Prime...

7- 8. B. C. #5523.....
110 M. 5" Prime shingles.....

7-16.	C. O. & G. #3306: 2 x 6, 2 x 8, 2 x 10, 2 x 14, 4 x 4 rough	14,730	"
7-20.	St. L. & S. F. #60194: 2 x 6, 2 x 4, 3 x 8, 4 x 12, 3 x 12 rgh.	8,744	"
7-21.	B. C. R. & N. #6016: 2 x 5, 14 and 16, 3¼ x 4½, 16, 2½ x 10½, 3 x 4, 12 and 14' S2S	14,282	"
7-24.	C. O. & G. #10,329: 2 x 4, 2 x 6, 3 x 4, 2 x 8, 1 x 12, 1 x 10	14,531	"
98			
7-24.	M. V. #5321: 2 x 6, 2 x 8, 2 x 10, 2 x 14 rough	15,272	feet.
7-27.	C. O. & G. #10093: 1 x 6, 1 x 10, 1 x 8, 1 x 12, 12, 14, 16 and 18 ft. lengths, 1¼ x 6, 1¼ x 8, 1¼ x 10, 1¼ x 12	10,041	"
7-27.	C. R. I. & P. #6351: 1 x 6, 4 x 10, 2½ x 6½, 2 x 8, 1 x 3 4 to 16 ft. long	16,128	"
7-28.	K. C. F. S. & M. #73773: 3 x 8, 4 x 12, 3 x 12, 2 x 6, 4 x 4	13,184	"
7-31.	C. O. & G. #11171: 23 x 4—18, 1 x 4, 1 x 6, 1 x 8, 1 x 12—12 to 14 ft. long. ⅜ x 4 ceiling, ½ x 6 siding, 1 x 6 casing—flooring	17,884	"
8- 1.	C. O. & G. #1241: 2 x 6, 12, 14 and 16', 3¼ x 4½—2—1, 2 x 10	12,364	"
8- 3.	B. C. R. & N. #1005: 2 x 14—12 to 26', 2 x 6, 2 x 8, 2 x 10	13,318	"
8- 6.	St. L. & S. F. #11467: 2 x 14, 12 to 24', 2 x 12, 22 to 26' 2 x 10, 2 x 8, 22 to 28', 2 x 6, 22 to 18' lengths	18,276	"
8- 6.	C. R. I. & P. #9060: 573 Pcs. 3 x 6—12 clear	10,314	"
8- 6.	C. O. & G. #46,254: Star flooring	11,453	"
8 -7.	B. C. R. & N. #9617: Star flooring	13,616	"
8-11.	C. O. & G. #10954: 2 x 4—12, 2 x 6—14 to 24'	11,226	"
8-11.	St. L. & S. F. #10120: #2. S2S—2 x 4—12, 2 x 6, 2 x 8—18 to 20'	18,764	"

8-13.	C. A. E. I. #11704: Siding, ceiling, and flooring.....	16,785	"
8-14.	C. & E. I. #60494: 1 x 4—12 rough, 1 x 6—12 rough.	10,230	"
8-17.	C. R. I. & P. #4109: 2 x 4—10 to 16', 2 x 8—12 to 16' 2 x 8—16', 2 x 10—12 to 16 ft. SIS & E.....	14,072	"
8-18.	E. T. H. #2487: 4 x 12—24—rgh. 3 x 8—24, 3 x 12—16	13,208	"
99			
8-20.	C. R. I. #4569: Clear stuff	34,550	feet.
8-20.	C. O. & G. #11419: 60 M. 6 and 5" Prime Shingles. 80 M. R. 4" Prime.....		
8-27.	C. O. & G. #4508: 2 x 14—20	32,283	"
8-31.	R. I. #10,868: 2 x 6, 2 x 8, 2 x 12, 2 x 14—rgh...	10,651	"
9- 1.	C. R. I. #4032: 1 x 4—8 to 26 ft. leng. flooring....	11,056	"
9- 6.	B. C. R. & N. #5637: 2 x 4, 2 x 6, 2 x 8, 2 x 10—12 to 14 ft. rgh.	13,293	"
9-11.	C. R. I. #90344: 2 x 6—26 rgh. 2 x 12—26, 2 x 14 —26 rgh.	18,300	"
9-12.	R. I. #8895: 10 M. Prime shingles.....		
9-13.	M. O. P. #33974. 2 x 4—18 S. & E. #2. 2 xx 6—12 to 16 ft.....	10,966	"
9-19.	R. I. #86605: 8 x 8, 2 x 10, 2 x 12 rough.....	10,888	"
9-30.	C. R. I. & P. #15706: 273 Pcs. 2 x 4—20 rough.....	12,740	"
9-21.	C. R. I. & P. #86582: 2 x 10, 2 x 8, 2 x 6, 2 x 4—14 to 24"	17,924	"
9-25.	C. R. I. & P. #85166: 2 x 14—12 to 24 rough.....	15,284	"
9-28.	C. & S. #6506: 2 x 4 12 to 18, 6 x 8 12 to 20'.....	15,763	"
10- 4.	C. R. I. & P. #85,029: 2 x 12, 3 x 6, 2 x 4, 2 x 6, 2 x 8...	19,202	"
10- 4.	C. R. I. & P. #85,468: 2 x 12—12 rgh. 1 x 8—10 to 20'..	17,849	"
10- 6.	St. L. & S. F. #55074: 2 x 14—26.....	15,287	"

10–10.	C. & E. I. #60000: 1 x 4, 1 x 6, 1 x 8 flooring.....	18,440	"
10–10.	B. C. R. & N. #9147: 2 x 8, 2 x 6, 2 x 14, 2 x 4, S2S.....	15,750	"
100			
10–10.	N. U. O. & W. #910: 2 x 4, 2 x 6, 2 x 10—rough.....	11,824	feet
10–12.	R. I. #54611: Rough and clear stuff.....	10,233	"
10–15.	R. I. #15164: 2 x 14, 2 x 12, 2 x 4 12 to 20' leng..	12,931	"
10–12.	R. I. #57214: 2 x 4, 2 x 6, 2 x 8, 2 x 12, 2 x 14 all lengths	14,204	"
10–20.	C. R. I. & P. #15337: Shiplap, ceiling and siding, flooring	15,736	"
10–22.	C. O. & G. #5153: 6 x 6, 8 x 8, 2 x 6, 2 x 4 all lengths.	16,520	"
10–25.	C. O. & G. #4205: 1 x 4, 2 x 4, 3 x 10, 6 x 10, 5 x 6, 2 x 4	13,185	"
10–26.	C. M. I. & P. #15423: 2 x 16—rgh., 2 x 14 12 to 24 ft. leng.	12,155	"
10–30.	C. O. & G. #1717: 3¼ x 4½ 14 ft.....	10,971	"
11– 1.	I. C. #42431: 4 x 6¼ 12.....	11,325	"
11– 3.	O. G. W. #2171: 2 x 6, 2 x 4, 6 x 6, 6 x 8, 1 x 4, 4 x 4, all lengths	17,858	"
11– 9.	C. O. & G. #3607: 1 x 12, 2 x 4, 1 x 6—2½ O. G. Batts.	20,670	"
11–13.	C. O. & G. #1224: Ceiling, flooring.....	22,786	"
11–21.	R. M. & A. L. #30199: Flooring, siding and ceiling.....	17,955	"
11–21.	N. & W. #31085: 8 x 8 10 to 20 ft. long.....	18,022	"
12– 4.	C. & E. I. #1592: 2 x 4, 2 x 6, 1 x 4—10, 1 x 12—12	12,209	"
12–10.	C. O. & G. #10694: 2 x 12—24, 2 x 8—16, 1¼ x 4—8 to 18'	10,958	"
12–15.	C. R. I. #2938: 2 x 8—24 to 12' long.....	18,760	"
12–17.	N. C. #2060: 2 x 12—24 flooring.....	14,560	"
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12–23.	A. & S. F. #23169: 2 x 14—14 to 24' long.....	16,203	feet

Year 1907.

1- 2.	C. O. & G. #8916: 2 x 14—26, 2 x 6—26	18,541	"
1- 6.	R. I. #70400: 3 x 6—12	10,226	"
1-18.	C. O. & G. #8981: 1 x 6, 1 x 12, 1 x 4, 2 x 8, 2 x 6, 2 x 4, 6 x 8, all lengths	27,833	"
1-21.	St. L. & S. F. #39152: 3¼ x 4½ rough	11,362	"
1-29.	P. & S. E. #7689: 2 x 6—12 to 18', 3 x 4—12, 3 x 6, 10 to 14'	17,251	"
1-30.	C. R. I. #52186: 2 x 4—12 to 18', 2 x 6—14 to 18', 1 x 6 16 rgh., 2 x 6—12	16,542	"
1-31.	C. O. & G. #8933: All flooring	28,885	"
2- 1.	C. I. & S. #14130: 3 x 4—12, 4 x 4, 2 x 6, 4 x 6, 2 x 8, all lengths	13,038	"
2- 5.	B. & O. #41004: 4 x 6—12, 3 x 6—12, 3 x 7—12	16,754	"
2- 6.	C. R. I. & P. #15247: 2 x 12 14 to 24', 2 x 6—12 to 24', 2 x 4, 2 x 14	16,100	"
2-13.	C. R. I. & P. #85876: 2 x 8, 2 x 6, 2 x 12, 2 x 4, 2 x 14, all lengths	19,566	"
2-14.	C. R. I. & P. #57937: 1 x 10, 1 x 8, 1 x 6, 1 x 8 shiplap, #2	9,365	"
2-20.	Frisco, 49963: 2 x 4, 2 x 6—10 to 14' sheeting, shiplap, bevel siding, ¼ round, etc.	23,972	"
2-23.	C. R. I. & P. #11228: Flooring 1¼ x 4—6—and other lengs.	15,035	"
2-26.	F. L. #6889: Flooring, sheeting, shiplap, ¼ round	19,700	"

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2-26.	M. O. P. #16974: 1 x 8, 10 to 20', 1 x 4—10 S1S, 1 x 6, 1 x 8, 2 x 4, 1 x 12	23,456	feet.
3- 2.	P. #25794—Mo. P.: 2 x 4, 2 x 6, 2 x 8, 1 x 4, 14 to 20 long	19,131	"

3– 5.	C. O. & G. #4589: 2 x 12, 12 to 18 ft. 2 x 4, 2 x 4 all lengths	10,858	"
3– 7.	A. T. & S. F. #53176: 2 x 4, 12 to 16, 3 x 12, 12 to 16, 1 x 6, 10 to 20, 2 x 8—16, 1 x 6—16	16,060	"
3– 9.	C. & E. I. #913: 2 x 6—16, 2 x 4—18—drop siding, flg. shingles		
3– 9.	Mo. P. #60334: 275 Pcs. 2 x 12—20 D. & E.	11,000	"
3–12.	I. H. #9480: 3¼ x 3½, 3 x 4, 2 x 6	14,459	"
3–13.	C. R. I. #97986: 1 x 24, 1 x 10, 1 x 6 all lengths	11,563	"
3–15.	R. I. #5602: 2 x 14, 2 x 8, 2 x 6, 2 x 4—14	14,585	"
3–18.	C. R. I. #2330: 2 x 12—12, 14 and 16' long.	17,290	"
3–18.	R. I. #5835: Shiplap, flooring, 2 x 6—18, 2 x 4—12	17,788	"
3–20.	P. & R. #7588: 2 x 12—20, 2 x 10—20, 2 x 8—20.	8,645	"
3–23.	C. R. O. #53883: 2 x 8—14, 12, 16 ft. S2S, 2 x 6, 1 x 12, 2 x 10	21,126	"
3–23.	C. E. I. #2950: 2 x 12, 1 x 6, 1 x 8, 2 x 4, 1 x 6—etc.	13,896	"
4– 2.	R. I. #4867: 1½ x 2½, 2 x 3, 2 x 2, 2 x 4, 3 x 4	12,013	"
4– 3.	C. R. I. #3465: 2 x 10, 2 x 4, 1 x 6, 1 x 4, 2 x 4—12	14,962	"
4– 3.	N. & L. E. #12500: 2 x 6—12 clear, 3 x 7—12, 3 x 6—12	10,611	"
4– 4.	C. H. & D. #17407: 3¼ x 6—14, 3 x 4, 3¼ x 5, all lengths	9,880	"

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4– 5.	P. R. R. #83117: 550 pcs. 3 x 6—12	9,900	feet.
5– 5.	R. I. #51345: 2 x 12, 2 x 6, 2 x 4, 18 to 20 ft. long.	12,812	"
5– 5.	M. K. & T. #14661: Shiplap, sheeting, 2 x 4—10 and 12'	18,501	"
4–12.	Big 4 #13303: 2 x 4—12 to 16', 2 x 6—20, 1 x 4—10 to 20'	10,766	"

4-13.	C. & E. I. #61781: Drop sidings, shiplap, shingles, baseboards, etc.		
4-13.	R. I. #150145: 1 x 8—#2. shiplap, sheeting #2. 2 x 8, 2 x 6 #1. S1S & E	11,334	"
4-14.	N. Y. C. & H. R. #58073: Finish—3" flooring, common stuff.	42,420	"
4-16.	C. R. I. & P. #32968: Flooring	12,298	"
4-16.	C. R. I. & P. #15566: 6 x 6, 2 x 4, 2 x 6, 2 x 14, 2 x 10 all lengths	15,807	"
4-19.	F. #28194: Shiplap, D. A. E. sheeting	16,561	"
4-23.	F. R. C. O. #17: 2 x 10, 2 x 8, 2 x 6, 2 x 4, 1 x 10	34,931	"
4-30.	C. R. I. & P. #9155: 2 x 8, 2 x 14, 2 x 4, 1 x 8, 1 x 10, 12, 14, 16, 18 and 20 ft	15,225	"
4-20.	C. R. I. & P. #9193: 2 x 8, 2 x 10, 2 x 4, 2 x 6, 1 x 10, 1 x 4, 1 x 6 finish	15,597	"
4-30.	P. R. R. #54325: 3 x 11, 3 x 12, 3 x 15, 3 x 6, 3 x 13, 1½ x 10, 4 x 4, 4 x 6, all lengths	12,500	"
5- 8.	B. Z. O. #65860: Pole Stock	10,861	"
5-11.	C. R. I. & P. #150761: Finish, flooring, laths, part., stops, baseboards, ⅞" cove, 1¼ x 12—S2S 2 x 8		
5-13.	C. R. I. #90508: 2 x 4 finish, 1¼ x 6 all lengths, 1 x 8, 1 x 10, 1 x 12 all lengths	13,601	"
104			
5-15.	C. R. I. #67387: 2 x 2—2 to 10 ft. S4S ½ x 2½—12	10,568	feet.
5-15.	C. O. & G. #94582: Shiplap	15,368	"
5-22.	C. R. I. & P. #56989: 1 x 6 ceiling	31,705	"

1907.

5-25.	St. L. & S. F. #11796: 650 Pcs. 1 x 6, 1 x 8, 1 x 19 #1. com. rgh.	15,075	"
5-28.	C. R. I. & P. #50662: 2 x 4, 1 x 4, 1 x 6, 1 x 4—flooring.	10,560	"

5-29.	E. & P. H. #2620: 2 x 4, 1 x 4—sheeting and battens.	12,000	"
5-30.	M. O. P. #1058: 2 x 12, 2 x 10, 2 x 6, 1 x 8, 1 x 5—shiplap	11876	"
6- 1.	B. C. R. & N. #1427: 193 Pcs. 2 x 14—26—90, 3 x 6—26	3,048	"
6- 4.	K. C. M. & B. #93115: 2 x 4, 2 x 12, 1 x 12, 1 x 10, 1 x 4 all lengths	12,839	"
1-12.	P. R. R. #10395: 3 x 7—12—3 x 6-12	10394	"
6-12.	B. C. R. & N. #7109: 3 x 4, 2 x 6, 2 x 6—2—3—4 x 10—16—2 x 8, 2 x 10 all lengths	12,986	"
6-12.	C. O. & G. #1300: 4 x 8, 2 x 4, 2 x 6, 4 x 6, 1 x 4, shiplap, drop siding, mldg. shingles.		
6- 6.	C. R. I. #9011: 595 Pcs. 2 x 4—18, 386 Pcs. 2 x 4—20	12,287	"
6-13.	B. C. R. & N. #5780: Drop siding, sheeting finish	11,566	"
6-20.	C. R. I. & P. #57825: 2 x 4—S. & E. #2. 1 x 6, 2 x 6, 2 x 10, 2 x 8 all lengths	12,354	"
6-25.	S. T. & S. F. #32725: Flooring finish, shingles, base ¼ round crown moulding, etc.		
105			
6-27.	Mo. P. #4867: 2 x 4—1 x 8—1¼ x 4—1 x 10—1¼ x 6 com. flooring, lath, crown mould, etc.		
6-29.	C. R. I. & O. #2981: Boxing #2. com. sid. #1 S. & E.	14,365	feet.
6-29.	C. R. I. & P. #82326: 2 x 10, 2 x 8, 2 x 12, 2 x 14, 1 x 4 all lengths	15,602	"
7- 3.	C. O. & G. #3096: 1 x 6 boards. 1 x 8 and 1 x 10	15503	"
7-10.	C. O. & G. #1553: 1 x 10, 1 x 8, 2 x 4, 2 x 6, 2 x 12, 2 x 4 all lengths	16,773	"
7-11.	C. R. I. & P. #53101: 1 x 6—10 to 16′, 1 x 8—10 to 20′ 4 x 4, 2 x 6, 2 x 8 all lengths	16,052	"
7-17.	S. T. L. & S. F. #34162: 2 x 4, 2 x 6, 2 x 8, 2 x 10, 2 x 12, 2 x 4, 1 x 6, 12, 10, 14, 16, 20 and 22 ft. long	13,695	"

7–17.	Frisco #15296: 2 x 6—26, 2 x 14—26, 2 x 4—12..	13,280	"
7–20.	T. & P. #11587: 2 x 4, 2 x 6, 1 x 6—all lengths.... C. R. I. & P. #52357: 2 x 4, 2 x 14, 2 x 2, flooring.....	13,331 13,900	" "
7–24.	T. V. #83911: 1½ x 6 to 16′, 2¼—6½, 16′; 2½ x 12½—16′ 3 x 6, 3 x 7 etc.....	10,849	"
7–27.	C. R. I. #90251: 2 x 16, 2 x 10, 2 x 6, 2 x 8—12 to 24′.....	13,568	"
8– 1.	I. G. & W. #4514: 2 x 4—10 to 16′, 2 x 7—10 to 20′..	16,265	"
7–31.	Frisco #121467: Sheeting, shingles, finish, flooring, ceiling, cornice, wind, stops, doors, base #1 common, etc....	15,112	"
8– 6.	C. R. I. #3156: All shiplap	19,125	"
8– 6.	G. H. A. #4237: 2 x 10, 2 x 6, 2 x 8, 2 x 12.....	20,243	"
8– 9.	St. L. & S. F. #30643: 2 x 4, 2 x 8, 2 x 6, 2 x 10—SIS....	19,194	"

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8– 9.	K. T. C. M. & O. #3156: All shiplap.		
8– 9.	T. & P. #12222: 2 x 10, 2 x 8, 2 x 6, 1 x 6—shiplap 1 x 8, 1 x 10—all lengths.....	18,981	feet.
8–13.	C. O. & G. #49529: #1. como. shiplap, finish—flooring	17,042	"
8–21.	St. L. & S. F. #121681: 2 x 12, 2 x 10, 2 x 6, 2 x 4, 2 x 8, 1 x 8, sheeting, 20 and 24 ft....	22,961	"
8–23.	C. R. I. & P. #32761: Flooring, base, moulding, ¼ round.		
8–20.	Mo. P. #33173: 4 x 4—12, 2 x 6—16 to 18, 2 x 8—12, 3 x 8—12, 2½ x 6, 4 x 4, 3 x 3	11,942	"
9–28.	I. C. #69231: 2 x 14—20 and 26.....	10,698	"
8–28.	St. L. & S. F. #1753: Common oak	11,456	"
8–28.	C. R. I. & P. #26434: Pole stock	12,395	"
8–31.	B. & I. #40153 Common oak	14,000	"
9– 4.	Mo. P. #33484: 1 x 6—16 and 20.....	17,300	"

9–13.	C. R. I. & P. #63487: 2 x 14—36	13,614	"
9–14.	C. R. I. #207: Finish, wind sills, flooring, casing, mouldings, boxing	17,722	"
9–18.	C. O. & G. #2102: 3¼—14 stuff	11,477	"
9–21.	Frisco #121010: All oak lumber and select	10,306	"
9–23.	C. O. Z. G. #1774: 2 x 4, 2 x 6, 2 x 8, 2 x 12	13,162	"
9–28.	M. K. & T. #10452: Flooring, shiplap #1, common, ceiling	18,036	"
10– 1.	C. R. I. & P. #52314: Shiplap and flooring	18,217	"
107			
10– 4.	Mo. P. #33799: All rough stock	10,956	feet.
10– 4.	I. C. #23634: 3 x 12—16 rough	10,635	"
10– 5.	C. A. S. #5292: All select finish	8,223	"
10–07.	B. C. R. & N. #7137: 2 x 14, 2 x 6, 2 x 4, 1 x 6, 2 x 6, 2 x 8, all 26 v. #1	10,654	"
10–10.	C. R. I. & P. #24047: All shiplap	14,300	"
10–16.	C. R. I. & P. #50245: 2 x 4, 2 x 8, 2 x 12, 1 x 6—#1	12,248	"
10–19.	K. C. S. #21411: All S2S lumber	10,951	"
11– 6.	C. O. & G. #11367: 2 x 6—14 to 20′ and ceiling	17,000	"
11–15.	C. & P. #22480: Rough white oak	7,125	"
11–18.	C. R. I. & P. #67078: #1 com. shiplap—sheeting, flooring, lath	9,000	"
11–19.	Wabash #71764: 2 x 6, 2 x 4, 1 x 12, 1 x 4—shiplap, drop, siding, boxing, flooring, finish—sheeting, columns, S8S—etc.		
11–22.	St. L. I. M. & S. #18087: Shiplap and flooring	12,129	"
11–27.	St. L. & S. F. R. R. #32764: Flooring, #1. com. ceiling	14,563	"

1908.

1- 4.	C. R. I. & P. #25296: Clear pine lumber, S4S.....	13,657	"
1-23.	St. L. & S. F. #121689: 2 x 6, 2 x 8—oak, 2 x 4, 1 x 6—pine, 1 x 6—16 roughdrop siding, shiplap—Lap siding—18,500 Economy, shingles.....	17,572	"
1-27.	C. R. I. #32943: Shiplap #1, and #2 finish, #1 com.	17,572	"
1-28.	C. A. & I. P. #31488: 3 x 8—10 to 16', 2½ x 6—10 to 18'	10,696	"
108			
3- 3.	C. R. I. & P. #27394: 2 x 12, 2 x 14, 2 x 6, 2 x 4, 2 x 8 all lengths	15,929	feet.
3- 4.	St. L. I. M. & S. #8890: 2 x 4—12 to 16', 2 x 6—12 to 16' 2 x 8 and 2 x 10 all 12 to 16' #1 and #2 common	17,219	"
3- 6.	C. R. I. #58693: 2 x 14—10 to 22', 2 x 8, 2 x 6, 1 x 4, flooring E. G. Flooring, sheeting	16,393	"
3- 7.	C. R. I. & P. #60490: Rough stock sheeting, and flooring bevel siding, economy shingles..	15,600	"
3- 7.	C. O. & G. #90769: 2 x 14—28, 2 x 6—28, 2 x 8—28..	10,145	"
3-16.	St. L. & S. F. #13,585: 2 x 6, 2 x 4, 1 x 12, 1 x 6, 2 x 6, 2 x 4, 2 x 6, 1 x 10—16 #2....	13,568	"
3-18.	Frisco #122,787: 2 x 6, 2 x 10, 2 x 12, 2 x 4—shiplap, flooring, ceiling, finish, crown moulding shingles		
3-21.	C. C. C. & St. I. L. #22318: 2 x 10, 2 x 6, 2 x 8, 1 x 6, 1 x 4, sheeting all leng's.....	14,268	"
3-21.	R. I. #15005: 2x 12—24 rough, 2 x 8—24 S. & E.	15,022	"
3-23.	Southern #135,059: Shiplap, sheeting, drop siding, flooring, finish, prime shingles, lath ¼ round moulding, window stops		
3-27.	I. C. #35607: 2 x 6, 2 x 8, 1½ x 8—10 to 16', 4 x 6, 3 x 8—2—1, 3 x 6—8....	13,834	"

4– 4.	C. R. I. #31608: Sheeting, flooring, and drop siding.	11,598	"
4– 9.	#54,111 C. R. I.: Sheeting, flooring, 2 x 10—14, 2 x 6—20	10,294	"
4– 9.	R. I. #31499: 2 x 10, 2 x 8-10 to 20′ boxing, flg. lap. siding, sheeting, ceiling, finish	21153	"
4–16.	C. R. I. #53874: 2 x 6—20, 2 x 4—20, 2 x 4—16 to 18′ 2 x 6—16 and 18′, 1 x 4—12, 1 x 6—16 #1.....	17,651	"
109			
4–23.	C. O. & G. #11087: 2 x 10—12 to 18′, 2 x 4—18, 1 x 8—shiplap	20,947	"
5– 1.	R. I. & L. #30587: All shiplap	21,443	"
5– 1.	C. R. I. & F. #150387: 2 x 6-16 to 22′; 1 x 40 12 to 16 ft. 1 x 10—12 to 20′ shiplap.....	15,683	"
5–11.	C. R. I. & P. #34391: 2 x 12, 2 x 4, 1 x 10, 1 x 4 #2....	19,184	"
5–16.	C. R. I. #350683: Flooring, sheeting, clear stock.....	19,519	"
5–18.	C. O. & G. #11340: All S2S stuff.....	14,000	"
5–23.	Frisco #124968: 2 x 14—rough.....	16,219	"
5–23.	Frisco #124020: 2 x 4, 2 x 8, 1 x 12, 1 x 6—14.....	21,222	"
5–28.	C. O. & G. #94693: 350 Pcs. 2 x 14—17 S. & E.....	14,700	"
5–30.	C. R. I. & P. #33445: 2 x 4—12 to 18 ft. long.....	15,927	"
6– 3.	C. R. I. & P. #33033: 2 x 6—16, 2 x 4—12, 2 x 8—20, 1 x 12—16	14,064	"
6– 3.	C. R. I. & P. #33318: Parting stops, boxing, sheeting flooring, 2 x 10—12 to 20′ #1, finish, star shingles, window stops, common #1, lap siding, etc....		
6– 4.	C. R. I. & P. #94707: 2 x 14—18 rgh. 2 x 16—18 to 22 ft.	11,423	"
6– 6.	C. O. & G. #11008: 2½ x 6—10, 3 x 3—12—14, 16, 18′ 3 x 4—12, 4 x 4—10, 14 and 16′, 2½ x 6—20, 2¼ x 6—8 to 16 ft. long	13,351	"

6-19. St. L. & S. F. #36474:
2 x 6—22 to 26 ft. #1, 2 x 6—10 to 20′, 2 x 8—10 to 16 ft. 1 x 4 shiplap ..... 15,914 "

4,229,315

110 *Defendant's Testimony.*

The defendant, to sustain the issues upon its part, introduced the following testimony:

Testimony of W. M. Collins.

W. M. Collins, being first duly sworn and examined, testified as follows:

Direct examination.

By Mr. Rose:

Q. What is your age?
A. 39.
Q. What is your occupation?
A. Manager of the Fourche River Valley Railroad.
Q. Have you had experience with the railroads before going to the Fourche River Valley & Indian Territory?
A. Yes, sir.
Q. How long?
A. I suppose fifteen years.
Q. When did you go with the Fourche River Valley & Indian Territory Railroad?
A. January 1st, 1908.
Q. In what capacity?
A. As manager.
Q. Been there ever since?
A. Yes, sir, I was there the 1st of January, but I never taken active charge until the 14th; I was on the ground and looked after it.
Q. You have been in active charge ever since?
A. Yes, sir.

111 Q. Do you know what property constitutes the Fourche River Valley & Indian Territory Railroad, where it begins, and how far it runs?
A. It begins at a place called Bigelow, on the Rock Island, and it ends at a place called Bellview.
Q. Look at this map and identify the point will you?
A. Here is Bigelow and here is Bellview.
Q. Show where it goes to?
A. The grade is finished nearly to that point; the rails go to here; that is the end of our jurisdiction as a railroad.
Q. At a spot marked "Camp"?
A. Yes, sir.

Q. At what section, township and range?
A. That shows section 5.
Q. What township and range?
A. 3 north and 16 west.
Q. You start at Bigelow; where is the mill of the Fourche River Lumber Co.?
A. Right there. (Indicating.)
Q. About a mile from the Rock Island?
A. Not hardly a mile.
Q. And the railroad runs from Bigelow out to here, winds up the gorge, and stops at the place called "Camp"?
A. We changed its name, made this Bellview instead of that there.
Q. How much of a dump have you beyond Bellview?
A. It is between three and four miles; I don't know the exact distance, because I have never paid any attention to it; I have been out over it once.

112 Q. The line doesn't run as far as the place marked Bellview on this map?
A. No, not quite that far; I think the right of way is out to that point.
Q. What weight of rails do you use in the railroad?
A. We have got 56 pound- over to Greytown, and 60 pounds out to the end of the track; there is a few 56 pound- mixed in with it.
Q. Is the railroad well built, substantial?
A. Yes, sir.
Q. How far are the cross ties apart?
A. We are supposed to have 18 ties to the rail on tangents and 20 on curves.
Q. How are railroads ordinarily built, is that the ordinary amount on railroads?
A. That is more than lots of railroads in Arkansas has got.
Q. Do you know the difference between the rails of the railroad and those of the Fourche River Lumber Co., used in its logging roads?
A. Only what I have seen by walking over parts of it.
Q. Are they as heavy as the rails in the railroad?
A. No, sir, they are either 40 or 45 pounds.
Q. Has the railroad ever had any track at Bellview or Camp, as it is marked on the map?
A. My railroad? No, sir.
Q. Have you ever exercised yourself, any jurisdiction over anything beyond that?
A. No, sir; we have a wagon road crossing there is my dead line; it has never been fixed up so we could operate it.
Q. You work for the Fourche River Valley Railroad?
A. Yes, sir.

113 Q. Have you any connection with the Fourche River Lumber Co.?
A. No, sir.
Q. Has any part of the track of the Fourche River Valley & Indian Territory Railroad ever been taken up?

A. The main line.
Q. Yes.
A. Since I have been there, no, sir.
Q. Since you have been there, has the Fourche River Lumber Co. ever loaded its cars on the main line?
A. No, sir.
Q. Does the Fourche River Valley & Indian Territory Railroad Co. get any divisions or differentials from the Rock Island Railroad, on lumber that is shipped out by the Bryant Lumber Co.?

Mr. MEHAFFY: We object, because the arbitrators have said that the Fourche River Lumber Co. must pay us.

Which objection was sustained by the court, to which action of the court, in sustaining said objection, the defendant at the time saved its exceptions.

Cross-examination.

By Mr. MEHAFFY:

Q. Who employs you?
A. I was hired by letter from Mr. Hartshorn.
Q. Mr. Hartshorn is of the Fourche River Lumber Co.?
A. I suppose so.
Q. Don't you know he is?
A. I suppose he is; I don't know what he owns.
Q. He manages both doesn't he?
114 A. Yes, sir.
Q. He hired you to manage the railway company?
A. Yes, sir.
Q. Will you tell us how you get your information that the railroad belonging to the Fourche River & Indian Territory Valley Railroad Co. commences and quits at a certain place?
A. I go by the charter; I have it in my desk and the profile.
Q. Do you do that?
A. I have got it there in the office.
Q. Do you go by that?
A. Well, and by the profile.
Q. You go by those?
A. Yes, sir.
Q. Don't you know if you go by those, don't you know that they provide that this very track that was taken up is right on the profile and right of way and charter of the railroad company?
A. It wasn't there then when I went there.
Q. I am not talking about when you went there; if you go by the charter and the profile, don't you know that the terminus is not what you said it was?
A. The railroad didn't build that piece of track.
Q. How do you know?
A. I was there.
Q. Who built it?
A. The logging spur.
Q. Who built this other part of it?
A. I don't know.

Q. Do you know whether or not the same parties built both?

A. No, I don't, I wasn't there.

115 Q. Don't you know that the Fourche River Lumber Co. controls the railroad company?

A. I don't know that they do.

Q. Yet you say that the manager of the lumber company employed you; don't you report to him?

A. No, sir, he hasn't given me an order.

Q. Aren't you employed by him?

A. I suppose he could can me if he wanted to.

Q. Aren't you employed by him?

A. I have two other bosses.

Q. They are owners of the Fourche River Lumber Co., aren't they?

A. I don't know that.

Q. Who are your Chicago officers?

A. Mr. Walker and Mr. Bigelow; I know they own a good deal of it.

Q. If you are going by your charter and profile, why don't you give the termini of that by it instead of from Bigelow to Camp?

A. The end of the road was where I spoke of as Bellview.

Q. That was where the tracks were laid?

A. Yes, supposed to have been built there by my predecessor.

Q. There had been tracks on out directly from the end of that?

A. Yes, sir, but built by somebody else.

Q. You don't know who built that?

A. No, sir, I wasn't there, and I don't know.

Q. At any rate, that track that was taken up begins precisely where this track commences?

A. It was taken up to that place.

Q. Yes.

116 A. You mean it was taken up to the place where this track is?

A. Yes.

Q. No, sir, I had a side track from there on; I had no use for it; do you want me to go into the details.

Q. I want you to answer the questions?

A. I want you to line me up then.

Q. I will line you up, if that is what you want; what do you call that place. (Indicating on map.)

A. Bellview.

Q. Where is Bellview?

A. Right there.

Q. Where is the end of the road that you testified to when Mr. Rose asked you about it?

A. Right there.

Q. That is the end of the railroad?

A. Yes, sir.

Q. I asked you if there was not a ro-d built on west of that, connecting with that, which has been taken up?

A. Yes, sir, a short piece, but not taken up back to where the end of this was.

Q. It was a continuation of this particular road, wasn't it?

A. Yes, sir, it was a continuation on this same dump.

Q. Wasn't it a continuation on this road?

A. No, sir, it was another company's road.

Q. You have already said you don't know who built this road, how do you know it was another company built it?

A. I said I did know; they are separate people that built that road from Bellview on, but I don't know who built this road from Bellview to Bigelow.

Q. How do you know it was a separate company?

117 A. I have no jurisdiction over it.

Q. If you don't know who built this other part of it, how do you know it wasn't built by the same parties?

A. I was on the ground when this piece was built, I wasn't when this was built.

Q. At any rate, what I asked you was, wasn't it a continuation an extension of this road; now you answered by saying yes, but built by a different company?

A. No, it was taken up.

Q. Before it was taken up, it was simply this road extended?

A. The main line.

Q. Yes.

A. If it had been, they wouldn't have taken it up.

Q. Please answer the question; wasn't it just an extension of that line, without any ifs and an-s about it?

A. Wasn't it an extension of the Fourche River Valley Railroad?

A. Yes, whether owned by them or who operated it; suppose the line you ran, ran up to here; didn't this part that was taken up commence right here and go on?

A. As the same railroad?

Q. I didn't ask you anything about the same railroad; didn't it commence right there, whether the same or different railroad; didn't it connect right there?

A. Yes, sir.

Q. So that it was, just so far as the rails and line and roadbed and everything else is concerned, so far as any physical appearance is concerned, it was an extension?

A. Yes, sir, it was different weight rails.

Q. You have different weight rails too in that place that

118 belongs to the railroad company?

A. They didn't put it up as they would have if it was under my jurisdiction.

Q. Haven't you different weight rails in the part you are operating?

A. Yes, sir.

Q. But the difference you say, in this was the difference in the rails?

A. Different rails and a different party handled it.

Q. Did they take it up before you went there?

A. They laid it and taken it up too.
Q. You were never permitted to operate on it at all?
A. No, sir, and I wouldn't operate it yet until I fixed it up.
Q. The fact of the business was, it wasn't fit to operate on?
A. Not for my part.
Q. What is your part?
A. My rolling stock.
Q. How long is your road you operate your rolling stock over?
A. I think it is 14.8 miles, or 14.4, I don't remember that.
Q. What did they use that extension for while it was there?
A. I suppose they used it for logs.
Q. Don't you know what they used it for?
A. They delivered logs to us at Bellview; I never used it.
Q. You do know they brought logs on that track, and you took them right on to Bigelow?
A. They delivered them to me on the side-track at Bellview.
Q. So it was used for getting logs?
A. I suppose so.

119 Q. You said you had gone by the charter and profile; don't you know the charter and profile, if you have gone by it at all, provides for building of a railroad by the railroad company, right where those tracks were?

A. The charter and profile that I am telling you about, the rails went up to that railroad crossing; that was the part of the track that was surfaced and in operation; there was bridge there; there were no rails over there when I succeeded my predecessor; my charter and profile, that was as much railroad as I knew anything about or know to this day.

Q. I asked you if that charter and profile, if you looked at that and you say you did, didn't show that this very track that was taken up was a part of the railroad company's track; didn't the charter show that was right on the line that the charter called for?
A. Yes, sir, it is on the line the charter called for.
Q. And it is right where the profile showed the railroad company's track to be?
A. Yes, sir, it is on their dump.
Q. Now, you say not all of that was taken up?
A. No, sir.
Q. How much is left there?
A. I don't remember the amount of feet.
Q. Approximately?
A. I will say 500 feet.
Q. 500 feet still there?
A. Yes, sir.
Q. How long was the original, or did you go over it to know?
A. No, sir, I never went over it.
Q. Who pays you?
A. The Fourche River Valley Railroad Co.

120 Q. How do you get it, in money or checks?
A. Checks; I make out my own checks.
Q. On whom?

A. We have Fourche River Valley drafts.
Q. Who handles that?
A. My check goes through the American Bank here.
Q. I mean with reference to the Fourche River Lumber Co.?
A. I suppose it goes through the German Bank over there.
Q. I mean with reference to the Fourche River Lumber Co.?
A. I suppose it comes back to their office.
Q. Didn't they pay it at their office; wasn't the check paid at their office and by them?
A. Yes, sir, I suppose it is, but it is paid with Fourche River Valley money; we have a deposit there.
Q. Whatever money you take in as a railroad, you deposit it there at the same place with the Fourche River Lumber Co's. money?
A. I don't know where they deposit there money.
Q. If you pay yourself in checks, you get your checks back?
A. Yes, sir.
Q. You know who pays them?
A. We have a vault there, we have a vault in our office.
Q. That is, the Fourche River Lumber Co's. vault?
A. Yes, sir, that is where we keep all our important documents like that.
Q. Do you keep account of the money that you take in?
A. I certainly do.
Q. What do you do with it?
A. What do I do with the money we take in?
Q. Yes?
A. I pay my expenses, operating, maintaining, transportation.
121 Q. And then?
A. If I have any left, I pay dividends.
Q. You don't have any surplus at all?
A. We haven't yet, I don't think.
Q. You haven't paid over any money to anybody else?
A. Nothing only dividends.
Q. To whom did you pay your dividends?
A. We paid them to the different stockholders.
Q. That is, the stockholders of the Fourche River Lumber Company?
A. The stockholders of the Fourche River Railroad Co. I believe there are one or two stockholders that are not in the Fourche River L'b'r Co.
Q. According to that, has the railroad company any capital stock except the ownership of what it has right there, or any money has it any money now?
A. Yes, I think we have some, I couldn't tell you how much, I haven't got that with me.
Q. You say if you make any, you pay dividends; what I want to know now is, have you accumulated anything at all—you haven't built the road anything like what the charter provides for, have you?

A. No, sir, I don't think we have.
Q. Don't you know you have not?
A. We haven't built it up to the amount of miles we have a charter for,
Q. Nothing like that, have you?
A. No, sir, I don't think so.
Q. Notwithstanding that, you are just paying out all the money you get in dividends to stockholders of the railroad company?
122 A. The amount of money we are making would not build very much railroad.
Q. That is what you do with it?
A. We pay dividends with whatever we have.
Q. Do you know anything about the rates or differentials that get on lumber to certain points?
A. I know a few of them, but not all of them; I have a man in the office that handles that for me.
Q. What few do you know?
A. I know the rate to Oklahoma points.
Q. Your differential to Oklahoma is 3½ cents, isn't it?
A. I think it is 2¾.
Q. Then Mr. Morrison is mistaken if he said it was 3½?
A. I can't help it, that is what it is.
Q. What are your differentials to Kansas City?
A. Let me finish that first; it is 2¾ from Greytown, and 3¾ from points beyond Greytown.
Q. Now, you have finished that?
A. Now Kansas, I think it is 3 cents from Greytown and 4 cents from points beyond Greytown.
Q. From Greytown, when you ship to Kansas points, you get a return or you get a division of the rate, amounting to 3 cents?
A. Yes, sir.
Q. And when you ship from points beyond Greytown, you get 4 cents?
A. Yes, sir, I think that is correct.
Q. Where is Greytown?
A. It is on our line beyond Bigelow.
Q. Approximately how far from Bigelow?
A. The switch where we pick cars up is about,—I will say
123 between ten and fifteen hundred feet.
Q. From Bigelow?
A. I don't know exactly how far it is.
Q. How much of your railroad *us* beyond that, on which you get 4 cents?
A. Less than 14.8 miles.
Q. On that, you get 4 cents on to Kansas?
A. Yes, sir.
Q. But 3¾ to Oklahoma?
A. 2¾ and 3¾.
Q. Beyond Greytown is 3¾?
A. Yes, sir.
Q. The other is 3 and 4?

A. No, we don't get 4 cents in anything except local shipments.
Q. Isn't it 4 cents to Kansas?
A. No, sir, it is 3¾ to Kansas; it is a cent higher west of Greytown.
Q. I understood you to say from Greytown to Oklahoma points it is 2¾?
A. Yes, sir.
Q. And beyond it is 3¾?
A. Yes, sir.
Q. And from Greytown to Kansas it was three and four?
A. I think that is right, but I wouldn't like to be positive, without having a tariff; you are getting me up against something I have a man to handle for me.
Q. Do you know anything about Missouri and Illinois points, about what differentials you get there?
A. No, sir, I don't; I don't know but what they are just the same; I think all of our interstate points is just the same,
124 except that Oklahoma rate.
Q. In other words, your idea is that you get from Greytown, if the shipment goes to Illinois or Missouri, that is shipped from Greytown, that you get 2¾?
A. No, I said Oklahoma, just one State; that is only one State; Oklahoma is 2¾ from Greytown.
Q. You think all the rest are the same except Oklahoma?
A. All the rest is 3 cents except Oklahoma, that is 2¾ from Greytown.
Q. All the rest, as you understand it, are three cents from Greytown?
A. Yes, sir.
Q. And 4 cents from points beyond Greytown?
A. Yes, sir, except Oklahoma which is 3¾.
Q. To Missouri and Illinois it would be 3 cents from Greytown?
A. Yes, sir.
Q. And four beyond Greytown?
A. Yes, I think that is correct.

Redirect examination.

By Mr. CANTRELL:

Q. Does the railway company keep a set of books and accounts?
A. A complete set, yes, sir.
Q. It has its own section hands and employees?
A. Yes, sir.
Q. It keeps its own bank account?
A. Yes, sir, with the Fourche River Lumber Co.
Q. You balance your cash and keep track of all your earnings and expenses?
A. Yes, sir.
125 Q. You are manager of the Fourche River Valley & Indian Territory Railroad Co.?
A. Yes, sir.

Q. When your railroad company builds any extension on its lines or builds any side-tracks or switches to its main line, do you have charge of that construction work?

A. Yes, sir, between Bigelow and Bellview.

Q. I mean, if your company or corporation undertakes to build any side-tracks or switches of its own, do you handle that with your employees?

A. Yes, sir.

Q. Do you pay them out of your funds?

A. I certainly do.

Q. When this road was built, which joins on the end of your line west of Bellview or the place you have shown on that map marked Camp, did your company pay for any of that construction work?

A. No, sir.

Q. That was not part of the Fourche River Valley & Indian Territory Railway or constructed by it?

A. No, sir.

Q. It was built by someone else as a logging road?

A. Yes, sir.

Q. Simply joined onto your road?

A. Yes, sir.

Q. You never exercised any supervision over it?

A. No, sir.

Q. Never ran any cars or locomotives over it?

A. I ran my logging cars over it; I never ran my engine or standard cars over it.

Q. You lent them their engine and carry your cars over it?

126 Yes, sir.

Q. You let the Bryant Lumber Company use them to-?

A. I furnished standard equipment to them, because we cannot interchange with the Rock Island unless our equipment is standard.

Q. With reference to your divisions; whenever there is any surplus over and above your operating expenses, that is paid out as dividends to stockholders of the railroad company according to their holdings?

A. Yes, sir.

Q. Whoever they may be?

A. Yes sir.

Q. Whether they are stockholders of the Fourche River Lumber Co. or any other company?

A. Yes, sir.

Q. You keep a list of your own stockholders?

A. Yes, sir, and my bookkeeper makes up the vouchers, and I sign them.

Q. Who is president of the Railroad Company?

A. Mr. Hartshorn.

By Mr. Rose:

Q. Where is Greytown, you have spoken of that several times; is that where your railroad crosses Fourche?

A. No, sir, it is between Fourche River and Bigelow.

Q. Is that the station out of which the Fourche River Lumber Co. ships?

A. That is the station from which we make the billing.

Q. From that, you get the 2¾ and 3 cents differentials you have spoken of?

A. You mean from that office.

Q. No, from Greytown, you say you get differentials from the Rock Island?

A. Yes, sir.

127 Q. That is, on shipments from the Fourche River Lumber Co.?

A. Yes, sir, that is the shipping point for the Fourche River Lumber Co., and anybody else that ships stuff out of there.

Q. Beyond there, when you get 3¾ and 4 cents differential, who ships out of there?

A. There is a concern called the Shawnee-Arkansas Lumber Co., and there is a man by the name of A. W. Link, I think is his name, and Jessie Nery, there is Krager & Thornburg, there is the Greenville Stave Co. there is B. H. Krager, there is a J. M. Williamson & Son; I don't know whether we have handled any cars for foreign points for them or not; I think we have.

Q. They are all lumber men out beyond the Fourche River Lumber Co.?

A. It is right on the end of our line, their loading yards; their mills are scattered out through the country.

Q. It is those people who get the 3¾ and 4 cents differentials; I mean, the railroad gets 3¾ and 4 cents differential on what those people ship?

A. Yes, sir; about our stave rate, I think there is a little difference, I can't remember what that was; I think that was a local rate, under which the stave people shipped to Little Rock.

Q. You said you would not run your engines over that extension of tracks made by the Fourche River Lumber Company beyond Bellview?

A. I would not run my engines over it.

Q. How was it built?

A. It was built for Shay engines.

Q. What was the matter with it?

A. It was not built for any standard equipment; the ties right there where they join on the end of this track, the ties there are placed four or five feet apart, six ties to the rail, may be

128 seven; across the bridge I don't know how they are, I have never been out there.

Q. Who owns that little Shay engine that runs out there?

A. The Fourche River Lumber Co., I suppose.

Q. That is not as heavy as your engine?

A. No, sir.

Q. That is a sort of cog wheel engine?

A. Yes, sir.

Q. Used only in the lumber business?

A. Yes, sir, that is all, and occasionally I get it from them to pull me on the track when I have a wreck, when I can't get one from

the Rock Island; the Rock Island occasionally comes over and pulls me on the track.

Q. That little Shay engine is not run on your jurisdiction?

A. No, sir, they can't come over on my line without orders from me.

Redirect examination.

By Mr. MEHAFFY:

Q. You say if there is a surplus, you pay dividends with it? If there is a deficit where do you get the money to pay it with?

A. I suppose I would have to try to sell some bonds.

Q. You have never had a time when you couldn't pay?

A. Not since I have been there.

Q. The money was always there?

A. I have managed to break even.

Q. Your road is not so good, where you run your fine equipment, but what you get off ocasionally?

A. Yes, sir, occasionally I get off,—tell me a road in the State of Arkansas that don't.

129 Q. Now, on this road you haul logs to the Fourche River Lumber Company every day, don't you?

A. Over the Fourche River Valley Railroad?

Q. Yes.

A. Yes, sir.

Q. And you do now?

A. Yes, sir.

Q. Isn't that nearly all your business?

A. No, we get—we have a good deal of merchandise trade; we have some live stock, and we have a good deal of emigrant outfits that are settling that country up there.

Q. Isn't it true that the great bulk of your business is hauling logs to the Fourche River Lumber Co.?

A. Yes, sir.

Q. By very far the largest part?

A. Yes, sir.

Q. Isn't practically all of it?

A. No, sir—practically all of it? No, sir.

Q. What per cent, what per cent would you say?

A. I couldn't say that.

Q. Do you think that the other business outside of hauling logs would amount to one per cent?

A. I am pretty sure it would amount to more than that.

Q. To 2%?

A. I won't say, because I don't know.

Q. You are right there managing things?

A. Yes, sir, I don't remember the things; I have the dope on the books to show you; if I had my statements I could show you.

Q. Is it approximately 2%, the other business?

—. ——.

Q. But the great bulk of your business is hauling logs for
130 the Fourche River Lumber Co.?

A. Yes, sir, but I don't remember what per cent it is.

By Mr. WILLIAMS:

Q. These logging cars, when they are loaded and you bring them in, you bring them clear to the mill?

A. Yes, sir.

Q. They are carried back empty?

A. Yes, sir.

Q. Where do you carry them to?

A. I deliver them to the point called wye.

Q. Where is that with reference to the point you call the end of your line, with reference to that where do you carry them?

A. I don't take them to the end of the line; they are getting logs east of there.

Q. When you were using that track, you did take them there?

A. Yes, sir.

Q. What became of them then?

A. They took them west of there.

Q. What did they pick them up with?

A. This Shay engine.

Q. They were carried out there for the purpose of loading logs?

A. Yes, sir.

Q. They brought them back to you?

A. Yes, sir.

Q. And you carried them into the mill?

A. Yes, sir.

Q. You are doing that business every day now?

A. Yes, sir, not at that point though.

Q. Wherever the switches that bring the logs from the
131 timber come into this line, that is where you deliver the empties and pick up the loads?

A. Yes, sir, we have an interchange track.

Q. This train that carries the logging cars you carry to the logging switch wherever that may be, you run two trains there, don't you?

A. Yes, sir, two round trips daily.

Q. You run separate trains?

A. Yes, sir.

Q. You don't haul logs on the same train you haul freight, cars and passenger cars, do you?

A. Yes, sir.

Q. You carry these logging cars to wherever the logging is being done?

A. Yes, sir, to our interchange track.

Q. Where do you go with the rest of the train?

A. We take the cars to Bellview; that will be standard equipment; we go out with a load of empty logging cars and empty box cars.

Q. They are all hauled in one train?

A. Yes, sir.

Q. You go to Bellview when you have business there?

A. We go there every day, one round trip, and we make two round trips, if we have any business.

Q. If you don't have any business, where do you go on this second trip?

A. We go to the point called wye.

Q. The second round trip is to pick up logging cars?

A. Yes, sir.

Q. When the track was in operation there that has *has*
132 been taken up, were there any emigrants or other business taken out on that line?

A. There has never been anything done west of Bellview, only their logging operations.

Witness excused.

133 Mr. ROSE: We ask to read the results of the first arbitration, Little Rock, Ark., Feb'y 3rd, 1906.

Objected to by Mr. Mehaffy.

134 *Result of the First Arbitration.*

LITTLE ROCK, ARK., *Feb. 3rd*, 1906.

On this day came before Judge Robert J. Lea, Chas. W. Lewis and Wm. Grayson, the arbitrators chosen by the Bryant Lumber Company and the Fourche River Lumber Company, the said parties by their respective attorneys, and the arbitrators make the following findings on the question heretofore submitted to them:

"We, the undersigned, to whom was referred the question of how much the Bryant Lumber Company shall be required to pay the Fourche River Valley & Indian Territory Railroad Company for hauling for ten years next after August 3rd, 1905, the timber and logs of the Bryant Lumber Company that it may acquire after said date, do hereby decide and fix the price at one and one-fourth cents per hundred pounds.

Thereupon the Bryant Lumber Company makes the following proposition:

"1. Switches to connect with rails of Fourche Co. shall be put in whatever needed by Bryant Lumber Company and the expense of same shall be borne in the usual way, viz: The Bryant Lumber Company doing the grading and furnish the ties and the Fourche Company laying the steel. (Switches to be of sufficient length to hold loads and empties and shall be put in on 20 days' notice)"

"2. And it is understood that any rails from which timber is hauled to the Mill of the Fourche Co. or to come under the above provision of contract (i. e. shall be considered Fourche River rails)."

"3. All inbound freight such as is necessary for the running and maintenance of a log camp shall be hauled at a price of one half cent per ton mile—any other freight at regular tariff rates."

"4. Freight shall be carried regularly and promptly be delivered as designated by shipper and at least once a day if needed."

135 "5. If a through rate should be established to the lumber markets from any point on the line, the Bryant Company shall have the benefit of it for the amount of its produce, the same as the Fourche Company."

"6. Not overlook in making rates for logging, that proportionate rates should apply on piling, staves and stave bolts, ties and other forest products."

To this the Fourche River Lumber Company makes the following response:

"The Fourche River Lumber Company, in response to the request of the Bryant Lumber Company to submit to this board six additional matters for decision and incorporation in the contract, say:

"1. Agrees to put in necessary frogs and switch stands, and furnish rails and lay same for any siding, not to exceed in length 600 feet wherever the Bryant Company may desire, provided such location is feasible from railroad point of view and further provided that on such siding the Bryant Company will agree to load not less than one million feet of logs."

"2. It does not know that it comprehends the meaning of the second proposition, but if it is intended to bring within the contract the logging roads or tram roads that it may build from time to time for temporary use in hauling timber from its land to the line of the railroad of the railroad company, it says that such proposition is not within the terms of the agreement or within the scipe of matters submitted to this board for arbitration; that it has at all times declined to make such an agreement, and cannot agree to submit the matter of making such agreement to arbitration."

"3. As to the third proposition, it says that only the rate to be charged for timber of the Bryant Lumber Company for its mills off lands that it should thereafter acquire or upon which it

136 should thereafter acquire the timber right was included within this submission. All other freight was left to be carried at regular tariff rates, and it did not, and does not, agree to submit any other rate to arbitration."

"4. It agrees to receive freight daily at regular stations to be forwarded to its stations. It will run one train a day each way, and where freight has been received in time, it will be forwarded the same day."

"5. It is a matter of public knowledge that where a rate on any commodity is published it applies to all, and there is nothing in this section to arbitrate."

"6. The sixth proposition is answered in our answer to the third proposition."

The first response of the Fourche River Lumber Co. is accepted by the board with the following modifications:

After the word "agrees" the board inserts upon 20 days' notice" and adds the following words at the conclusion: "or if the amount of logs loaded at such siding be less than 1,000,000 feet (one mil-

lion), the Bryant Lumber Company shall pay all the expense of constructing the siding."

The second proposition of the Bryant Lumber Company is rejected by the board, as is also the third.

The response of the Fourche River Lumber Company to the fourth proposition is adopted as the finding of the board.

On the fifth proposition the board rules, that if the railroad company allows any differential or rebate to the Fourche River Lumber Company, it shall allow the same to the Bryant Lumber Company.

The sixth proposition is rejected as not within the terms of the arbitration.

(Signed) ROBT. J. LEA.

137 *Testimony of Peter Duclow.*

PETER DUCLOW, being first duly sworn and examined, testified as follows:

Direct examination.

By Mr. ROSE:

Q. What is your age?
A. 51.
Q. Where do you live?
A. At Bigelow.
Q. In Perry County?
A. Yes, sir.
Q. How long have you lived there?
A. Six or seven years, or little longer, since 1903.
Q. What is your occupation?
A. I am superintendent of the woods of the Fourche River Lumber Co.
Q. What is it your business to do?
A. Look after the logging and switching of logs to the main line.
Q. Does your jurisdiction cover logging roads laid down by the Fourche River Lumber Co.?
A. Yes, sir.
Q. Did you have them built?
A. Yes, sir.
Q. Do you know the line of the Fourche River Valley & Indian Territory R. R.?
A. Yes, sir.
Q. Where does that terminate?
A. It starts out at Bigelow, and runs out to Bellview, or the old camp as they call it.

138 Q. It seems that the rails were laid down beyond that at one time. Who laid those rails down?
A. I did.
Q. What kind of rails were they? Were they the same weight that the railroad rails were, or were they lighter rails?

A. Lighter rails, all but two or three or four hundred feet; they were steel; they were for the bridge.
Q. Who loaned you those?
A. They belonged to the railroad company.
Q. All the rest of the rails belonged to the Fourche River Lumber Co.?
A. Yes, sir.
Q. Where did you get them, did you buy them new or take them off some other road?
A. We took them off a branch road.
Q. Logging road?
A. Yes, sir.
Q. How far did you build from Bellview or Camp westward?
A. I laid rail about 4800 feet or thereabout.
Q. Nearly a mile then?
A. Yes, sir.
Q. Then what did you do with them?
A. When we got through logging, we took them up to the end of the heavy steel.
Q. What did you do with those rails?
A. Put them on another branch.
Q. While they were lying there, did the engine of the Fourche River Valley & Indian Territory Railroad ever run over them?
A. No, sir.
Q. What sort of engine operated on them?
139 A. Shay engine.
Q. What sort of engine is that?
A. Side gear, turns with a crank.
Q. Very powerful?
A. Powerful and very light.
Q. Used for logging purposes?
A. Yes, sir.
Q. Can't go fast can it?
A. No, sir.
Q. Just a traction engine?
A. Yes, sir, runs about six or seven miles an hour.
Q. Was that track up there constructed like the railroad company's track?
A. No, sir, it was never ballasted; it was just laid down on an old dump the railroad company had made there.
Q. Were the cross-ties as close together as in the railroad?
A. Yes, sir, very near, about fifteen to a rail.
Q. Was the track of the kind suitable to running heavy engines over?
A. No, sir.
Q. Was it built just like your other logging tracks?
A. Yes, sir, same way, but the dump was a little better.
Q. It had the advantage of being on a good dump?
A. Yes, sir.
Q. Has the Fourche River Lumber Co. loaded any logs on the main line of the railroad since it has been running passenger trains?
A. Yes, sir, they have a few.

Q. Recently?
A. Not recently, no, sir.
Q. How long ago was that?
140 A. Three years or better, may be four, I forget.
Q. Were the cars alone, or did they have an engine with them?
A. They had an engine with them.
Q. Did the Fourche River Lumber Co. ever load on the main track without having an engine with it?
A. No, sir.

Cross-examination.

By Mr. MEHAFFY:

Q. They loaded on the main track until they got their logs away from there, didn't they?
A. Yes, we ain't loaded along there for three years.
Q. You haven't had any there to load?
A. No, sir.
Q. They loaded there until they got their logs away?
A. Yes, sir, they had spurs run wherever they was.
Q. You built this extension, beginning where you say the railroad ends, you say?
A. I laid down the steel.
Q. You laid the steel?
A. Yes, sir.
Q. Who built the dump?
A. The Railroad Company.
Q. The Railroad Company did everything except you went out there and laid the steel?
A. They gave us permission to lay the steel, and they rented the roadbed from the railroad company.
Q. The railroad company built a dump out there and rented it to the mill company; is that your idea?
141 A. I don't know how they were doing it.
Q. You do know that the railroad company built that dump?
A. Yes, sir.
Q. And prepared it?
A. Yes, sir.
Q. And you went and laid rails on it?
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.
Q. Now the beginning of that road, back at Bigelow, who built that?
A. The Lumber Company built it to start with.
Q. So that the lumber company no more built this extension that they tore up than they did the first part back there?
A. I don't understand——
Q. The lumber company built the begin-ing of the railroad there at Bigelow, just as much as they did this part you tore up, didn't it?

A. When the lumber company first started, they didn't have the road incorporated, and they just had one company.

Q. You know as a matter of truth, that the lumber company built this first part of the road?

A. Yes, sir.

Q. Then the railroad company came along and built some?

A. Yes, sir.

Q. Then the Railroad Company built all this dump and prepared the dump for you to lay rails on?

A. Yes, sir, about three miles.

Q. That is all the railroad company's?

A. Yes, sir.

142 Q. Did you buil- the first part of the road yourself?

A. Yes, sir.

Q. How far?

A. About seven or eight miles.

Q. And how long is the whole thing now?

A. The steel is laid on twelve or thirteen mile- of it.

Q. So that the lumber company built practically all the railroad?

A. Yes, started it.

Q. Didn't they build it, didn't the lumber company build it? Didn't they build 8 miles of it?

A. They built seven or eight miles, and the steel was laid on five or six miles, and then there is three or four miles of dump yet, and that wouldn't be half of it.

Q. If it is twelve miles long, that wouldn't be half of it?

A. No, sir.

Q. How much did the lumber company build?

A. Seven or eight miles.

Q. And the whole road is about twelve miles?

A. The steel is about twelve miles.

Q. I am asking you about the road, starting out from Bigelow. the lumber company built that?

A. Yes, sir.

Q. Didn't it lay the steel on that?

A. Yes, sir.

Q. Completed the road, didn't it?

A. Yes, sir.

Q. Then how much did the railroad company build?

A. They built the remainder.

Q. About four or five miles to the end of the steel?

143 A. I never measured it, and I never saw the profile.

Q. You built seven or eight miles for the railroad, and you know the whole business is about twelve miles to the end of the rails?

A. 12 or 13.

Q. The railroad company, when it built that other part on out this dump, it built this part where these tracks were taken up?

A. Yes.

Q. You didn't have any jurisdiction over the operation of the railroad?

A. No, sir.

Q. You didn't have any jurisdiction over the yards of the mill either?

A. No, sir.

Q. They have separate bosses for each particular work?

A. Yes, sir.

Q. Separate boss for the railroad, separate boss for the woods and separate boss for the yards?

A. Yes, sir.

Q. You have just as much to do with the railroad management, as you do with the management of the mill proper?

A. All I have to do is tend to the switching in the woods, and getting the logs out.

Q. You don't have any more to do with the management of the yards at the mill than you do with the railroad?

A. No, sir.

Q. That is under a separate management entirely?

A. The lumber company run the mill and wood business.

A. Yes, sir, and they run the railroad business too, as far as you know, the same as they run the woods business?

144 A. Yes, sir.

Q. Some other party runs the yard business?

A. Yes, sir, a man runs the yards and mill.

Q. Where does he stay?

A. At the office of the mill at Bigelow.

Redirect examination.

By Mr. ROSE:

Q. The railroad is about 14 miles long isn't it?

A. I couldn't tell the exact length of the rail, because I never paid any attention to the profile or length of the road.

Witness excused.

145 *Testimony of W. M. Collins.*

W. M. COLLINS, being recalled, testified as follows:

Direct examination.

By Mr. CANTRELL:

Q. I overlooked asking you one question, with reference to the unloading switch; since you have been with the Fourche River & Indian Territory Railroad, has the Bryant Lumber Co. or Mr. Faisst at any time offered to construct the dump and lay the rails in shape for you to put down the steel?

Mr. WILLIAMS: We object to that, if your Honor please; we are not suing, as I understand this complaint, on any failure of theirs to put down anything except this unloading switch at the river.

Mr. CANTRELL: That is the one I am talking about.

Q. Referring to the unloading switch at the river, over which we have the controversy here now, has the Bryant Lumber Co. or Mr. Faisst, ever offered to construct the unloading switch, that is to build the dump of it and lay the ties on it, in accordance with the award of the board of arbitrators, so you could go on and put down your steel rails?

A. He has never mentioned it.

Q. Have you ever had any conversation with either of the Faissts in regard to the ties on that dump?

A. One evening, his brother offered to sell me the ties on the dump.

Q. How long ago was that?

146 A. I think that was in the spring of 1908.

Q. Has the railroad company been ready and willing to put down its part of that switch, as soon as the dump was prepared according to the award of the Board of Arbitration?

A. I have given him everything he has asked me for, ever since I have been over there.

Q. Has the railroad company been now and at all times ready to build that switch as soon as he did his part of that work in putting ties on it?

A. Any place he will grade the dump for a switch for any purpose, we are supposed to put in as a railroad, I am ready to put it in.

Cross-examination.

By Mr. MEHAFFY:

Q. You would be governed entirely by what Mr. Hartshorn said about it, whether you did it or not?

A. From a railroad standpoint?

Q. I don't care anything about your standpoint?

A. No, sir, I put in one switch for Mr. Faisst, I don't suppose Mr. Hartshorn knows where it is at.

Q. If Mr. Hartshorn were to tell you to put in one, you would do it, and if he told you not to put in one, you wouldn't, would you?

A. I don't know whether he could control me on that or not.

Q. I thought you said he had a right to can you?

A. Yes, sir, the railroad commission can can me to-; they are my bosses too.

Q. We are talking about doing things at the request of the Bryant Lumber Co. If they made a request and Mr. Hartshorn told

147 you to comply with it you would do it?

A. In what way?

Q. If they were to make a request and he would tell you to comply with it, you would do it?

A. Make a request in which way?

Q. To put in a switch?

A. If they would make a request for me to put in a switch and grade it and put ties on it?

A. Yes?

A. I certainly would if they would show me where I would get any business there, I would put it in, and if I didn't, the Railroad Commission would force me to do it.

Witness excused.

148 Adjournment was taken until 9:30, the 6th of April, 1910, when the following evidence was introduced:

Testimony of F. D. Martin.

F. D. MARTIN, being first duly sworn and examined, testified as follows:

Direct examination.

By Mr. CANTRELL:

Q. Where do you live?
A. 2201 Summitt Ave.
Q. In this city?
A. Yes, sir.
Q. What is your business?
A. I follow civil engineering.
Q. How long have you been a civil engineer?
A. I have worked at it all my life—14 years.
Q. Was your father a civil engineer before you?
A. Yes, sir, Jas. A. Martin.
Q. Did you study your profession under him?
A. Yes, sir, just a practical knowledge is all it is.
Q. Have you recently made a survey of the logging switch that the Bryant Lumber Co. started to build at Fourche?
A. I was out there yesterday afternoon.
Q. Did you make a measurement of it?
A. Yes, sir.
Q. Who assisted you?
A. Mr. H. D. Fowler.
Q. What did you find to be the length of the switch?
1500 feet.
Q. What was its grade?
149 A. 3½% straight grade.
Q. Was there a reverse curve there?
A. No, sir, two separate curves 150 feet.
Q. And the grade was uniformly 3½%?
A. Yes, sir.
Q. At the lower end of it, was there any rise to keep the cars from going off?
A. No, sir, it was just finished out to straight grade.
Q. Still running out to a grade of 3½% at the end?
A. Yes.
Q. How about the alignment of it?
A. It wasn't put in at an alignment to the curvature. It is just straight to one stake 100 feet apart.

Q. It was just in a succession of straight lines?
A. Yes, sir, around the first curve.
Q. Not curved at all?
A. No, sir.
Q. Was it in shape for a railroad engine to be run on it, if the track had been put on it?
A. No, sir.
Q. It was just a lot of sharp lines?
A. Just angles, yes, sir.
Q. Were there any cross ties on it?
A. There was cross ties scattered on the first four hundred feet, but they were not spaced.
Q. Were there enough cross ties for the engine 1500 feet?
A. No, sir, there wasn't any beyond the four hundred feet.
Q. Were there enough for that?
A. No, sir, I don't think there was; I don't think there was
150 over two hundred ties, and it takes about 250 for that.
Q. What was the embankment made of?
A. It was just dirt.
Q. Any logs in it?
A. When I made the first trip out there, I understood there was logs still——

Mr. ROSE: Don't tell what you understood.

Q. Did you see the logs?
A. I don't know for certain that they are in there.

Cross-examination.

By Mr. MEHAFFY:

Q. Is this your first experience in staking off a switch or spur for a railroad?
A. No, sir.
Q. This examination was made yesterday afternoon?
A. Yes, sir.
Q. How long has that embankment been there?
A. It has been there ever since about 1906.
Q. About four years?
A. Yes, sir.
Q. You were out there after it was built in 1906, were you not?
A. I made a trip out there in 1905, when I first laid it out.
Q. You were out there just after it was built, were you not?
A. Yes, sir.
Q. You staked it off yourself, didn't you?
A. Yes, sir.
Q. What grade did you provide for it—you have your
151 profile, haven't you?
A. No, sir, I didn't make but one profile that I remember at the time; I didn't make copies, I just made it and turned it over to the person I worked for.
Q. You don't know where that is?
A. No, sir.

Q. Don't you know that profile was much less than 1%?
A. No, sir, I do not.
Q. What do you know about it?
A. I know it was 3½% grade when I fixed it the last time.
Q. I am not talking about what you did, but I am talking about what your survey provided for, when you made the original survey or staked it out, or whatever you call it?
A. When I made the original survey, it was 1½% grade, but it made a twelve foot embankment at the end, and the next time I went out there, I cut it down.
Q. What did you cut it down?
A. 3½%.
Q. So it is built in accordance with just what you made the profile for?
A. It is to grade.
Q. It is built to grade al-right, according to your idea?
A. Yes, sir.
Q. Who did you go out there for?
A. Fourche River Lumber Co.
Q. There has been nothing done there since the building of the embankment?
A. No, sir.
Q. Now, that one per cent grade would make the end of the
152 dump at the water or down at the end of the dump from the railroad, 15 feet lower than the other, wouldn't it?
A. Yes, sir, from the begin-ing.
Q. And you made it 3½% grade?
A. Yes, sir.
Q. That would be 50 feet lower than the railroad?
A. Yes, sir, 45 or 50 feet.
Q. It would be 15 feet for every hundred,—one per cent would be 15, and ½ per cent would be half of that?
A. Yes, sir.
Q. So that it is actually built now, and is now to the grade that you made yourself?
A. Yes, sir, it is to grade.
Q. When did you make that second survey or profile?
A. It was in the first part of 1906, as well as I remember.
Q. How did that leave the dump at the end from the railroad, the end of the spur?
A. That is a straight grade, clear from the railroad.
Q. What I mean is how high above the surface was the end of the spur?
A. About a foot fill.
Q. And so far as you know, and so far as you could see, that dump is built of dirt?
A. Yes, sir.
Q. How high is the river embankment at that place?
A. I suppose it is about eight feet down to the water.
Q. Doesn't the main line of this railroad run right on the river embankment?

A. No, sir, it runs right to the embankment, right to the
153 end.

Q. I am talking about the main line, the main road, that is on a level with the river embankment, isn't it?

A. No, sir; you mean the main Fourche River line?

A. Yes.

A. That is not on the line of the bank of the river.

Q. Not on a level with the bank?

A. No, sir, that is a raised dump, five feet above that.

Q. Five feet above the bank?

A. Yes, sir.

Q. If the river bank is eight feet, and that is raised five feet, it would be only 13 feet above—five feet above the bank?

A. I don't know about that, I never took any measurements on that.

Q. Don't you know if the river bank is 8 feet, and the fill of the roadbed is five feet, that that simply makes 13 feet?

A. Yes, sir, but the difference in the elevation of the railroad and the river down to the end of the line is a good deal more than that?

Q. Isn't that surfaced there practically level?

A. No, sir.

Q. The railroad where the railroad is, is on a level with the bank of the river; of course, the railroad bank is level five feet, but I mean the surface is on a level with the river bank?

A. No, sir, the river bank is a good deal lower.

Q. How many curves do you say there is in that?

A. A curve on each one hundred feet.

Q. You mean there is a curve and straight line between the curves?

A. Yes, sir.

154 Q. Isn't that built just precisely with the stakes you yourself put there?

A. It is al-right if they were, but it is not built to any curvature.

Q. Just as your stakes were set, they built the road?

A. Yes, sir.

Q. It wasn't in any sense finished up?

A. No, sir, it wasn't finished in the grading and alignment for the curves.

Q. Not finished up for the purpose of putting ties or rails on?

A. No, sir.

Q. Did you take the level so you can state what the level or depression is from the river bank to the railroad?

A. No, sir, not from the water.

Q. I mean from the top of the bank?

A. No, sir.

Q. Didn't you do that in making your survey there?

A. Not this last time.

Q. Did you the first time?

A. I don't remember whether I did or not.

Q. You can't say what it was?

A. No, sir.
Q. You didn't do it this last time?
A. No, sir.
Q. What did you do with the last profile you made in 1906?
A. I turned it over to the Fourche River Lumber Co., when I left there.
Q. You didn't make one yesterday?
A. No, sir.
Q. What did you do with the first one you made?
155 A. I turned it over to them; I don't remember whether I made the first one.
Q. That one you did make, the road is built, so far as the grade is concerned, in accordance with that?
A. Yes, sir.
Q. What did you make that grade 3½% for?
A. I don't know how I made it, I think on account of the 13 foot fill in the first line.
Q. Who directed you to do that?
A. I can't remember that.
Q. Don't you know it was the Fourche River Lumber Co.?
A. I don't remember of their authorizing me to do it, I don't remember how I came to do it.
Q. You just went down and did it?
A. I know that was what it was.

Redirect examination.

By Mr. ROSE:

Q. When was it that you made that last profile at 3½% grade?
A. I think it was in January or February, somewhere in the first part of 1906.
Q. Near two years before the arbitrators fixed the grade—the roadbed you say is not built according to your alignment, but went from stake to stake; suppose it were laid out that way, could a train go over it?
A. No, sir, it couldn't go over it any distance in the condition it is now.
Q. Suppose the roadbed were perfect, that it is the full width and ties on it and the rails? Could a railroad train go around
156 it in the way it is now at those angles?
A. No, sir.

Witness excused.

157 *Testimony of W. M. Collins.*

W. M. COLLINS, recalled, testified as follows:

Direct examination.

By Mr. CANTRELL:

Q. Have you a list of the cars of timber, logs, that Mr. Faisst shipped over your road?

A. Yes, sir.

Q. And the amount calculated, showing the amount of feet of timber carried on each car?

A. I have got it from 8-29-07.

Q. I am talking about logs now?

A. I am just telling you when it dated back to.

Q. That is August, 1907?

A. Yes, sir.

Q. Have you the average, taking 25 cars, the last 25 cars out of that list, have you figured it up to find out the average number of feet on a car?

A. Yes, sir.

Q. What do they show the average to be of the number of feet of logs carried on each car?

A. The average is a fraction less than 5,327 feet; I can't figure those fractions.

Q. Have you taken Mr. Faisst's list of lumber shipped out and ascertained how many feet there were on an average, of the cars of lumber?

A. The last 25 I checked off with the list this morning.

Q. What is the average of a car of lumber?

A. A fraction over 15,725.

Q. It would take then about three cars of logs to make one car of lumber, would it not? You say one is 5,330 feet of logs, and
158 the car of lumber carries 15,700 feet of lumber, then it will take about three cars of logs to make one of timber, doesn't it?

A. Three cars of logs will make one car of lumber.

Cross-examination.

By Mr. MEHAFFY:

Q. Why didn't you take all of your cars instead of picking out the last 25?

A. I didn't know I had time to figure it all up, and I haven't got all the feet on all of the cars clear back to 1907.

Q. Why didn't you get that?

A. I have got no record of it.

Q. You have just got a record of the cars there?

A. No, sir, I have a record of pretty near all the cars.

Q. You said you didn't have a record of those back there——?

A. I will show you my list.

Q. I don't care to see it; if you were going to testify about the logs and were preparing for that purpose, why didn't you get the logs that you had hauled prior to that time, instead of beginning about where Mr. Faisst's lumber quit?

A. I have a record of about all the feet on logs that have been hauled on that railroad since I have been there.

Q. Couldn't you have got a record of this before that?

A. No, sir, it is not in my office.

Q. Why didn't you get that?

A. I tried to get it going through the bills of lading.

Q. You didn't try outside of your own office?

A. No, sir.

Q. In other words, you mean to say there is absolutely no record of the logs hauled for Faisst or the Bryant Lumber Company until August, 1907?

159 A. You mean the feet?

Q. I mean the record of cars of logs hauled?

A. I have the cars.

Q. You have a record there——

A. No, sir, I haven't any record but this.

Q. This begins in August, 1907?

A. Yes, sir.

Q. What you mean to tell the jury is that you have no record or any means of information at all as to the cars hauled before that time?

A. No, sir, I don't know anything about them at all.

Q. Did you go there in August, 1907?

A. No, sir.

Q. When did you go there?

A. January 1st, 1908.

Q. There was some record of logs hauled before you went there?

A. I can answer that question the way it was handed me be the chief clerk in the office.

Q. Answer it any way you want to?

A. They settled at the Fourche Station, they settled with the Rock Island at the Fourche Station on bill of lading for those cars, before the railroad became thoroughly organized as a railroad company without waybill; that was given to me by the clerk in the office——

Q. The question that I asked you is this——

By Mr. CANTRELL: Let him finish his explanation.

A. The railroad company there cares nothing about anything but the weights, they didn't care anything about this feet; they simply wanted the weights; we hauled everything by weights and not

160 by the feet, but there was so much correspondence in that office, and my predecessor had some trouble with Mr. Faisst, I taken it on myself to have a correct record put on my bills of lading, of all the feet as was given to me by the Fourche River Lumber Company's log scaler, and the number of the car, who does the scaling; we have nothing to do with that, but when he gives me the number of the car loaded, ready to be billed out, I put the number of feet on that car on the bill of lading for my own benefit; it was never done before that.

Q. How did that benefit you?

A. I will have to tell you that too. That is going back some more; when I went over there, Mr. Faisst had a dispute with the company on five cars of logs, the car demurrage or car service amounted to something like $180 to the Rock Island, and they wanted him to pay it, and he wouldn't pay it, and they wanted us to pay it, and we wouldn't pay it; the dispute in the two scalers, his scaler and our scaler didn't disagree in dollars and cents, didn't amount to over three hundred dollars; that is, the dispute between

the two scalers; he let those cars stand on his track until the car service amounted to $180 odd dollars; that is the reason I kept a record of the feet on the cars after I went there.

Q. You kept a record all the time after you went there?

A. I had my office force to do it, sometimes I did it myself.

Q. Let's go back to the question I asked you; you said awhile ago that that was just a record of logs hauled after you went there, and prior to the time you were there, no record was kept; now, as a matter of truth, you went there in Januaty, 1908, and you have a record there from August, 1907 before you went there?

A. Of the car numbers but not the feet.

Q. I don't care anything about the car numbers but the feet.

A. I have the weight; I have the car record from the way-
161 bill copy book of the date of the shipment, car number, date, weight, amount——

Q. From August, 1907?

A. Yes, sir.

Q. What is the first date that you have the feet on there?

A. T-12-09, here is 6-25-09; this is my first record, 2-22.

Q. Don't you know that your statement that you kept a record of feet from the time you went there, can't be true, and that it was more than a year after you took charge there—a year and two months, before you ever made any record at all?

A. I think I have made a miscue on this statement.

Q. I think you have made several miscues; don't show that there is absolutely no record of feet until you get down to February 12, 1909?

A. That is my bull; I think I have got it.

Q. If you have got it, why didn't you put it there?

A. I think I can get it.

Q. If you have it or if you think you have it, why didn't you put it there,—what excuse or explanation have you to make for not putting it on there?

A. I didn't leave it off intentionally.

Q. I am not accusing you of anything, I am just asking questions now.

A. That is my mistake al-right.

Q. At any rate, notwithstanding you state you took the weight for your own benefit, from the time you went there, it is true from that list, you have no feet there for more than a year after you went there?

A. No, sir, not according to this list, I haven't.

Q. You made that list for the purpose of testifying here?

162 A. Yes, sir, I thought I had it here; I was simply bulled on those figures.

Q. Isn't it true that you didn't keep any record of feet?

A. We have a memorandum record of the feet.

Q. You have a memorandum of all those feet; now can you explain why it is that you took a portion of it and didn't take the other?

A. No, this morning I figured up 25.

Q. I am not talking about this morning; your list shows you didn't keep any feet until February 1909, if you did make a memorandum showing that, why did you leave that off and put the feet in on the others; why you didn't put the feet there before that time?

A. Monday when they told me they were going to have me summoned, I started to work to try to get all the information I could, and that is what I got up, and I was under the impression I had it all from the time this trouble came up about this car service, but I haven't got it.

Q. When you testified there awhile ago, looking at the sheet in your hand, didn't you know then it didn't give any feet for a long while there?

A. I told you you had me bulled up, and I am not very good in figures.

Q. I don't want to bull you up, but I don't see how being good or bad in figures would make you leave off the feet in some instances

A. I never discovered about the date when it commenced until after you came over here; I made the statement to you and I thought it was all there.

Q. You began on this Monday?

A. To dig this information up?

Q. Yes.

163 A. Today is Wednesday; I was called down here Monday noon.

Q. You said awhile ago you began on that Monday?

A. Yes.

Q. Did you try to get any back of that at all?

A. I have still got the office boy digging after this.

Q. What is the last car you have got there?

A. 2-2-10.

Q. So that you have kept the feet for about one year, not quite a year?

A. There are a few of those cars I have still got out, I haven't got the record; there are a few cars that I haven't got it.

Q. How many cars have you got altogether?

A. I will have to count it.

Q. You haven't figured it up at all?

A. No, sir.

Q. In figuring this morning, did you take the last 25 cars?

A. Yes, sir, I will give you the number of them; I will call them off and let you check against me; I took the last 25 cars of logs, and I have the last 25 cars of lumber on that list.

Q. That doesn't correspond at all in time or date does it?

A. I have the feet, I haven't got the car number.

Q. Let's get at another question; you knew that the last on that list was somewhere in 1907, didn't you?

A. No, sir, I never looked at the dates.

Q. Didn't know anything about it?

A. No, sir, I looked at the feet; I didn't know the car number or anything, I just looked at the feet.

Q. You took your last twenty-five cars, and that didn't include any of the cars Mr. Faisst testified about?

A. I don't know what he testified about; I gave the
164 number of my cars; I got the number of feet on the last 25 cars of lumber, and the last 25 cars of logs.

Q. There are a number of those last cars that are down here at approximately 3,000 feet?

A. 3500 and 3600; I have one 3597.

Q. They run from three to five thousand, don't they; there is one six thousand; there are two 6700.

A. There is one 6769, 6781.

Q. And 6347, 6326?

A. Yes, sir.

Q. And 6504?

A. Yes, sir.

Q. And that is all of the cars that have as much as 6000 in that batch, in that 25 cars, six cars with 6000 feet?

A. Yes, sir.

Q. Several of them have something above 3000?

A. Yes, sir.

Q. At the top of the list where you began to have your feet at all, practically all of them are five and six thousand and some seven and some eight thousand; here is where you begin, five and six, a few four, and pretty nearly all of them five and six and seven, and some of them eight thousand?

A. 8,000 feet of logs?

Q. Yes, that is your list.

A. I don't believe that is correct.

Q. That is your list, made by you?

A. I haven't got 8000 feet on this list.

Q. That is just what I am complaining about, you took the little cars and left the big ones; what capacity were the cars used by you in hauling Mr. Faisst's timber?

165 A. We have some fifty and some forty.

Q. By 50, you refer to the pounds?

A. No, sir, capacity of cars.

Q. What is the capacity in either feet or pounds?

A. 50,000 capacity cars; we can load our lumber on that and it will carry 44,000 lbs.

Q. Your cars are forty and fifty thousand capacity?

A. Yes, sir.

Q. Do you know what the capacity of the cars was prior to that, the Rock Island cars the timber was hauled on?

A. Do I know the capacity of the cars?

Q. Yes.

A. I don't know what the capacity of them is; I know the number of them.

Q. Don't you know the capacity is much greater than the cars you use?

A. Of Rock Island equipment?

Q. Yes.

A. Yes, sir.

Q. Then you know that cars shipped in which Faisst's lumber was billed over that road, when they were using Rock Island cars that the capacity of those cars was much greater than you have figured there?

A. You mean the capacity of the empty car?

Q. Yes.

A. Yes, sir, certainly.

Q. Wouldn't they hold a great many more logs in feet or weight than the cars you used?

A. They will hold more weight.

166 Mr. ROSE: I want to introduce in evidence, may it please the court, the two lists, our list of cars he has, and Mr. Faisst's list of lumber shipped.

Mr. MEHAFFY: We introduced the list by Mr. Faisst.

Witness excused.

167 *Testimony of F. D. Martin.*

F. D. MARTIN, being recalled, testified as follows:

Direct examination.

By Mr. CANTRELL:

Q. Have you figured the amount of excavation and embankment at the unloading switch?

A. Yes, sir.

Q. How much excavation was there?

A. 216.7 yards.

Q. What would it cost to put that switch up?

A. I figure the excavation at 30 cts. a yard, and the embankment at 25.

Q. How much embankment was there?

A. 729.9 yards.

Q. Of embankment?

A. Yes, sir.

Q. How much would it come to altogether?

A. $247.48.

Q. That is allowing 30 cents a yard for excavation and 25 for embankment?

A. Yes, sir.

Q. It was all earthwork?

A. Yes, sir.

Q. What is the average price paid for earth work in railroad construction?

A. 19 cents is the highest on any work I have been on, and 30 cents for excavation.

Q. You have allowed higher than you have ever known it?

A. Yes, sir.

168 Q. Still it comes only to $247.48?

A. Yes, sir.

Cross-examination.

By Mr. MEHAFFY:

Q. When did you make that calculation?
A. Since I came this morning; I went over my notes I took yesterday.
Q. What is the width of the base of the embankment?
A. It is 26 feet across the top of the cut, 14 feet at the bottom of the cut, and on the fill, it was 25 feet across the base of the fill, and 14 across the base of the cut.
Q. They had to cut some?
A. Yes, sir.
Q. What is the top of the cut from bank to bank?
A. 26 feet.
Q. And the base of the embankment is how many feet?
A. 12½; one is 13.5, and the other 12.5.
Q. What do you mean by that?
A. I mean the distance out from the center.
Q. I asked you about the entire width of the base?
A. That is 26 feet.
Q. What is the top?
A. The top is ten.
Q. What is that measurement?
A. That is right across the top.
Q. Where is that measurement on the book?
A. I measured from center out, cross section.
Q. Where is that?
169 A. I just took the center stakes.
Q. Where is that measurement?
A. It is 12½ feet out, and then a foot and a half fill.
Q. What do you mean by that?
A. That is the embankment.
Q. You mean that indicates the slope?
A. Yes, sir.
Q. From that, you get the top?
A. Yes, sir.
Q. That 26 foot base is for how far?
A. That runs from one stake to another, one hundred feet, each one is different.
Q. Did you, in making up your calculation, take each one that way?
A. Yes, sir.
Q. Will it average 26 feet at the bottom?
A. No, sir.
Q. Will it average 20 feet at the bottom?
A. No, sir, it will average about 14½.
Q. What will it average at the top?
A. Nine feet I guess.
Q. Where is the lowest you have at the base?
A. Here.
Q. Do you mean to say that when the very lowest you have got

is about 13 feet at the base, and the highest is 26, don't you know it would average very much, a great deal more than 14 feet, don't you know it is bound to do that?

A. I can figure it out.

Q. Never mind; in figuring that 3½% grade there, don't you know that would take it below the river bed from the main line?

170 A. No, sir, that is just the way it is; that is all I know about it, what the instrument shows it to be.

Q. When did you make these measurements?

A. Yesterday.

Q. Don't you know that since that embankment has been built, the river has been over that and a good deal has been washed off, and it don't indicate as much as it did in the beginning?

A. It has just washed on the edges.

Q. Hasn't the river been over that embankment?

A. Yes, sir, that would make it less.

Q. Wash it off?

A. Yes, sir, and I give it just as I get it from the cross section.

Redirect examination.

By Mr. CANTRELL:

Q. The center line, is that washed down?

A. No, sir, the center line is to grade.

Q. In making your calculations of quantities, you allowed for the embankment being full width?

A. Yes, sir, from the cross-section.

Q. You calculated from what it was originally?

A. Yes, sir.

Q. And the whole thing could have cost only $247.48?

A. Yes, sir.

Recross-examination.

By Mr. MEHAFFY:

Q. That cut you spoke of, is there just one cut?

A. Yes, sir.

171 Q. And that is a very small cut?

A. Yes, sir, two feet.

Q. And how long?

A. It is 300 feet long; each *and* takes a foot and a half and two feet in the center.

Q. So there is more than 1200 to fill?

A. Yes, sir, seven hundred feet, 216 yards of excavation and 721 yards of embankment.

Q. If that cut is 300 feet long, the fill is something more than 1200 feet long isn't it?

A. There is 200 feet in there that is to grade.

Q. Level?

A. Yes, sir.

Q. That would leave something over a thousand feet of fill?
A. Yes, sir.
Q. You didn't figure getting the ties on there that were put there, in that $247?
A. No, sir, I didn't count the ties.
Q. You didn't figure them in your estimate at all?
A. No, sir.
Q. Did you figure the clearing off of the right-of-way?
A. No, sir.
Q. You didn't figure them in your estimate at all?
A. No, sir.
Q. Did you figure the clearing off the right-of-way?
A. No, sir.
Q. Why didn't you figure all the cost of the work that was done there?
A. I was just called on to figure the yardage.

172 Redirect examination.

By Mr. ROSE:

Q. Do you know whether the right-of-way had to be cleared off at that point?
A. There was 600 feet of right-of-way had to be cleared off.
Q. What is the cost of clearing off right-of-way?
A. About $12.38 where it is 100 feet wide, but there it is only 50 feet wide.
Q. So it would be over $12.00?
A. No, sir, $12.00 an acre.
Q. How many acres had to be cleared off?
A. It runs about six hundred feet there.
Q. That wouldn't make an acre would it?
A. I would have to calculate it; it would be not quite an acre, it would be 30,000 square feet.
Q. How many ties did you say there were there?
A. I wouldn't judge there were over 200 ties there.
Q. How much were they worth?
A. I don't suppose they would be worth over 16 cents; they wasn't regulation ties.
Q. 200 ties at 16 cents, that would make about $32, wouldn't it?
A. Yes, sir.
Q. Were there any other elements of cost that went into that switch?
A. Not that I know of.
Q. The whole thing then would be less than $150, or little over $180,—$280?
A. Yes, sir.

173 Recross-examination.

By Mr. MEHAFFY:

Q. You are just guessing at the cost of the ties?

A. Yes, sir, not being regulation ties; we pay 22 cents apiece for regulation size ties.

Witness excused.

The defendant here rested its case.

174 *Plaintiff's Rebuttal.*

Mr. MEHAFFY: I want to introduce the joint application for the charter.

Mr. ROSE: I object to that and save my exceptions.

Read as follows:

175 LITTLE ROCK, ARK., *Aug. 3rd,* 1905.

To the Hon. The Board of Railroad Incorporation, Little Rock.

GENTLEMEN: The undersigned have settled their controversies with respect to the building of a railroad on the line for which a charter was asked by the Fourche River Valley and Indian Territory Railroad Company. By the terms of the settlement the completion and operation of the road, as a railroad, is assured, if a charter is granted; and we therefore join in respectfully petitioning your Honorable Body to grant the charter heretofore asked for by N. P. Bigelow and others, as incorporators of the Fourche River Valley & Indian Territory Railroad Company.

Very respectfully,

FOURCHE RIVER LUMBER COMPANY,

(Signed) By N. P. BIGELOW.

BRYANT LUMBER COMPANY,

(Signed) By B. FAISST.

176 *Testimony of B. Faisst.*

B. FAISST recalled, testified as follows:

Direct examination.

By Mr. MEHAFFY:

Q. When you were on the stand yesterday, you sai- you would figure up the amount of the differentials, according to the testimony of the defendant here, have you done so?

A. Yes, sir.

Q. What does it amount to?

Q. The figures given by the defendant are $5315.54.

Q. That is the list of lumber that was introduced in evidence?

A. Yes, sir.

Q. And figured on the differentials that the testimony of the defendant's witnesses show-?

A. Yes, sir.

MAPS

TOO

LARGE

FOR

FILMING

Q. Something was said about the cost being $247, for building this dump, and a little additional for cleaning the right-of-way and ties, I want to ask you about the ties, what they cost?

A. I don't remember the exact cost, but there were two carloads of ties, and it was hardly possible that we could purchase them for 32 cents; we paid 18 for moving them two miles.

Q. Mr. Martin testified he had made two surveys, one something less than 1½%, and one 3½%, were you ever notified by him or by the Fourche River Lumber Co. of that survey?

A. Never was.

The above question was at the time objected to by attorney for defendant, which objection was by the court overruled, and defendant saved its exceptions.

Q. Have you a profile there showing the length of the road, The Fourche River Valley & Indian Territory, or do you know its
177 length the charter provides for?

A. The charter provides for a road of 44 miles, and this is the profile of it, or map of it.

Q. When this contract was made, how much was built then?

Question objected —, and question withdrawn.

Q. 44 miles you say is the length of the road?

A. Yes, sir.

Question and answer objected to as not rebuttal, and the defendant asked that it be excluded from the jury, which objection was overruled by the court, and defendant saved its exceptions.

Witness excused.

Plaintiff here rested its case.

Mr. WILLIAMS: The plaintiff asks to amend *his* complaint, according to the damages shown, to conform to the proof.

The defendant at the time objected to said amendment being permitted, which objection was overruled by the court, and defendant saved its exceptions.

The defendant here rested its case.

This was all the testimony in the case.

(Here follows blue print marked p. 177*a*.)

178 *Plaintiff's Instructions.*

The plaintiff asked and the court gave the jury, over defendant's objections, the following instructions:

I.

The court instructs the jury that by the terms of the contract entered into by and between the parties hereto, it became and was the duty of the Fourche River Lumber Company, after procuring the incorporation of the Fourche River Valley & Indian Territory Ry. Co., to construct or cause the said Railway Company to construct, a railroad along the route indicated by its profile, and provided for by its charter; and further, that by the findings of the board of arbitration, the Bryant Lumber Company had the right to have its logs hauled from any part of said road that had been constructed where the same had been used by the Fourche River Lumber Company.

You are therefore instructed, that it is immaterial, so far as the plaintiff is concerned, whether the Fourche River Lumber Company actually constructed the road or any part of it, or caused the same to be constructed by the Fourche River Valley & Indian Territory Ry. Co., if you find from the testimony that a part of said road was constructed on a dump constructed by the Railway Company, along the lines according to the charter and profile made for the said Railway Company and that the Lumber Company had been using same for the loading of its logs, then you are instructed that the Bryant Lumber Company plaintiff in this suit, had the same right, provided it should be executed between the hours named, to-wit: 4 p. m. and 9 a. m., and if you find from the testimony that the Lumber Company either refused the use of the said part of said road so constructed, or tore the same up or took it up, so as to deprive the Bryant Lumber Company of
179 the use thereof, before it could in a reasonable time have shipped its logs into its mill, then you are instructed that the defendant would be liable to the plaintiff for whatever damage it sustained thereby, as the same may be shown in the proof.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

II.

The court instructs the jury that by the terms of the contract and that by the findings of the Board of Arbitration, to which the same was submitted, the defendant Lumber Company, was required to pay to the Bryant Lumber Company, the same differentials that the Fourche River Valley & Indian Territory Railway Co. received on interstate shipments with the Fourche River Lumber Company, and if you find from the testimony that the Fourche River Valley & Indian Territory Railway Co. has received and been receiving, certain differentials from the Rock Island Railroad on

interstate shipments, and that the Fourche Lumber Co. has not paid to the Bryant Lumber Company the same differentials on lumber that the Bryant Lumber Company has shipped to the same territory, you are instructed that the defendant is indebted to the Bryant Lumber Company in the amount of any such differentials, which it has not paid, as may be shown by the proof.

To which action of the court in giving said instruction the defendant at the time saved its exceptions.

180

III.

The court instructs the jury, that, if you find from the testimony that defendant, the Fourche Valley & Indian Territory Railroad Company, after the award refused to put in the unloading switch or notified plaintiff that they would not do so except upon the first grade established requiring a 12 foot dump, which was less per cent than the grade established by the arbitration, then this amounted to a breach of the contract and plaintiff would be entitled to damage, therefore as may be shown by the proof.

To which action of the court in giving said instruction the defendant at the time saved its exceptions.

IV.

The court instructs the jury that if they find from the testimony that the Fourche River Lumber Company and the Fourche River Valley & Indian Territory Ry. Co. are composed of the same individuals, although different corporations, and that jointly they had constructed a railroad along the line indicated by their profile, and that the lumber company had been using the same for loading its logs, and that the same was afterwards torn up or taken away before the plaintiff was allowed to complete its loading of its timber, within a reasonable time, and within the fair import of the contract, then you are instructed that the defendant is liable to the plaintiff for any damages occasioned thereby.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

181

V.

The court instructs the jury further, that if you find from the testimony, or from all the circumstances in the case, that the removal of the rails from this part of the road which it is claimed was built by the Lumber Company and used by it, was a mere subterfuge to avoid compliance with its contract with the Bryant Lumber Company, then you are instructed to find for the plaintiff and assess its damages at whatever sum you may find by the proof it has sustained.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

VI.

The jury are instructed that if from the whole case they find that the defendant has violated any of the provisions of the contract sued upon, or that award made by the arbitrators, their verdict should be for the plaintiff on account of any such violation, in the aggregate amount of loss sustained by the plaintiff on each violation as the proof may show.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

VII.

The court instructs the jury that plaintiff is entitled to recover any damage the proof may show, it suffered by reason of the delay occasioned by the failure or refusal of defendant to construct loading switch on request, if any is shown, and the measure of damage will be any deterioration of logs awaiting shipment, extra expenses incurred and any lost timber occasioned thereby, as the
182 proof may show.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

VIII.

The court instructs the jury that the measure of damage for removal of track and refusal to allow plaintiff to load his logs on the track, if you so find, would be any pecuniary loss sustained by plaintiff in paying for timber, contracts which he may have lost by inability to move the timber occasioned by the act or failure of defendant also for timber lost and destroyed occasioned thereby, according as the same is shown by the proof.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

IX.

The court instructs the jury that the measure of damage for failure or refusal of defendant to construct or to cause to be constructed the unloading switch for defendant would be the pecuniary outlay of plaintiff in preparing the dump for the switch, including ties together with any increased cost to plaintiff in handling his logs occasioned thereby as the testimony may show.

To the action of the court in giving said instruction the defendant at the time saved its exceptions.

183 *Defendant's Instructions.*

Upon the request of the defendant, the court gave the jury the following instruction:

VIII.

The burden of proof is on the plaintiff, and you will find for the

defendant unless you find that the plaintiff has sustained its contentions by the fair preponderance of the evidence.

The defendant requested the court to further instruct the jury as follows:

I.

You are instructed to find in favor of defendant on the plaintiff's claim for $1500.00 damages for refusal to permit it to load logs on the main line of the Fourche River Valley & Indian Territory Railway.

The court refused to give said instruction numbered (1), to which action of the court refusing to give said instruction, the defendant at the time saved its exceptions.

II.

You are instructed to find in favor of defendant on the plaintiff's claim for $2500.00 damages for failure of the Fourche River Valley & Indian Territory Railway Company to construct the unloading switch at Fourche River.

The court refused to give said instruction numbered (II), to which action of the court refusing to give said instruction, the defendant at the time saved its exceptions.

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III.

You are instructed to find for the defendant on plaintiff's claim for $1500.00 damages from the removal of the track west of Bellview.

The court refused to give said instruction numbered (III) to which action of the court refusing to give said instruction, the defendant at the time saved its exceptions.

IV.

You are instructed that the claim of the plaintiff for differentials was not within the terms of the contract nor properly submitted to the arbitrators, and you will find for the defendant as to that issue.

The court refused to give said instruction numbered (IV), to which action of the court refusing to give said instruction the defendant at the time saved its exceptions.

V.

You are instructed that the payment to plaintiff the differentials provided for in the fourth paragraph of the award of the arbitrators would be the granting to plaintiff of a rebate forbidden by law, enabling the plaintiff to transport its goods at less than the tariff rates, and you will find for the defendant on that issue.

The court refused to give said instruction numbered (V), to which action of the court refusing to give said instruction, the defendant at the time saved its exceptions.

185

VI.

Under the terms of the contract the defendant has the right to build logging switches connecting with the line of the Fourche River Valley & Indian Territory Railroad, and to take them up at pleasure. These switches the plaintiff has no right to use. If you find that the defendant built a logging switch begin-ing at the terminus of the line of said railroad company and running westward in the same general direction, you are instructed that the plaintiff had no right to use said switch and that the defendant had the right to take it up, and that the fact that it ran for a part of the distance along the dump thrown up by the railroad company and in the same general direction would not affect the defendant's rights in the premises; and if you find that the track west of Bellview or Camp that was taken up was put in by the defendant and not by the railroad company, you will find for the defendant on that issue.

The court refused to give said instruction numbered (VI), to which action of the court refusing to give said instruction, the defendant at the time saved its exception.

VII.

You are instructed to find for the defendant.

The court refused to give said instruction numbered (VII), to which action of the court refusing to give said instruction *to* the defendant at the time saved its exception.

These were all the instructions asked, given, and refused in the case.

These were all the instructions in the case.

186 *Verdict.*

After argument of counsel, the jury returned into court the following verdict:

Motion for New Trial.

In due time the defendant filed its motion for new trial, which was in words and figures as follows, to-wit:

The defendant moves for a new trial herein because it says:

1. The verdict is contrary to the evidence and not sustained thereby.

2. The damages are excessive.

3. The court erred in giving each of the instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9 asked by plaintiff.

4. The court erred in refusing each of the instructions numbered 1, 2, 3, 4, 5, 6, 7, asked by the defendants.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Defendant.*

187 Which motion for new trial coming on for hearing before the court after argument of counsel and the court being well and sufficiently advised in the premises doth overrule said motion to which action of the court the defendant at the time saved exceptions and prayed an appeal to the Supreme Court, which was granted. Defendant asked, and was granted 90 days in which to prepare and file a Bill of exceptions.

Now, within the time granted by the court, comes the defendant and presents to the court this its bill of exceptions, containing all the evidence, instructions asked given and refused and proceedings had, and asks that the same be signed, sealed, and made a part of the record in this cause. Which is accordingly done.

Given under my hand and seal this 31st day of May, 1910.

(Signed) GUY FULK,
Judge of Pulaski Circuit Court.

(Endorsed:) "Filed May 31st, 1910. F. J. Ginocchio, Clerk, L. J. Gibson, D. C."

188 *Clerk's Certificate.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, F. J. Ginocchio, Clerk of the Circuit Court, within and for the County aforesaid, do hereby certify that the foregoing and annexed transcript contains a true, correct and perfect copy of all the pleadings and record in the cause therein mentioned, as the same appear of file and of record in my office.

In testimony whereof, I hereunto set my hand and the seal of said Court, this 3rd day of June, 1910.

[SEAL.] F. J. GINOCCHIO, *Clerk*,
By O. L. McNAIR, *D. C.*

189 *Fee Bill.*

F. J. Ginocchio (50c. pd. by ——)	$13.60
B. L. Roberts	2.05
Jury Tax	3.00
Witnesses	10.50
This Transcript (F. J. Ginocchio)	55.00
Total	$84.15

Attest:
[SEAL.] F. J. GINOCCHIO, *Clerk*,
By O. L. McNAIR, *D. C.*

190 *Filing in Supreme Court.*

No. 1375.

FOURCHE RIVER LUMBER CO.
vs.
BRYANT LUMBER CO.

Transcript.

Filed June 22, 1910.

P. D. ENGLISH, *Clerk.*

191 *Stipulation Amending the Record.*

STATE OF ARKANSAS,

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 26th day of September, 1910, a day of said term:

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

Come the parties by Attorneys and file Stipulations under Rule XXIV amending the record herein so as to speak the truth.

192 In the Supreme Court of Arkansas.

No. 1375.

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Appellant prays that the transcript in this cause may be amended by the filing and insertion of a table of car shipments of logs, which said table of shipments was introduced by the witness Collins on behalf of the appellant, and was inadvertently omitted in the preparation of the transcript.

Appellant says that counsel on both sides of the case have agreed that said table may be filed as part of the transcript and it attaches hereto a stipulation in writing to that effect.

Wherefore it prays for the filing of said table of shipments and the making of said table a part of the transcript in this cause.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Appellant.*

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Supreme Court of Arkansas.

FOURCHE RIVER LUMBER COMPANY
vs.
BRYANT LUMBER COMPANY.

The bill of exceptions in this case has been amended by adding thereto the annexed table of car shipments of logs introduced by the witness Collins on behalf of the defendant, and it is agreed that said table may be used on this appeal without certiorari.

MEHAFFY & WILLIAMS,
Attorneys for Plaintiff.
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendants.

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Date.	Number.	Feet.	Weight.	Rate.	Prepaid.	Collect.	Origin.
8/29/07	36	..	55280	2	9.19	1.87	Rankin
9/ 2/07	40	..	65000	2	10.13	2.87	"
9/18/07	36	..	63280	2	10.42	2.24	"
9/26/07	44	..	55400	2	8.30	2.78	"C"
10/14/07	38	..	66200	2	10.08	3.16	"
10/19/07	40	..	71900	2	11.36	3.02	G
10/28/07	44	..	63100	2	9.74	2.88	"C"
11/23/07	30	..	61100	2	10.19	2.03	"
11/15/07	40	..	50600	2	7.80	2.32	Rankin
11/15/07	44	..	57600	2	8.99	2.53	"
11/15/07	38	..	46300	2	7.26	2.00	"
11/15/07	36	..	46400	2	9.28	2.58	"
11/15/07	34	..	52100	2	8.25	2.17	"
2/ 3/08	40	..	61000	2	10.04	2.16	"
2/ 3/08	38	..	49900	2	8.08	1.90	"
2/ 4/08	34	..	58800	2	9.69	2.07	"
2/17/08	34	..	64000	2	10.64	2.16	"
2/21/08	40	..	63200	2	10.32	2.32	"
2/21/08	30	..	60900	2	9.71	2.47	"
2/28/08	44	..	69900	2	11.65	2.33	"
3/ 7/08	40	..	52500	2	9.00	1.50	"
3/ 7/08	40	..	45900	2	7.40	1.78	"
3/20/08	34	..	40700	2	6.15	1.99	"
3/20/08	40	..	37000	2	5.38	2.02	"
3/20/08	30	..	41200	2	6.03	2.21	"
3/20/08	38	..	52600	2	7.98	2.74	"
4/10/08	44	..	54800	2	9.09	1.87	"
4/ 9/08	34	..	49300	2	8.12	1.74	"

4/15/08	30	..	49700	2	8.16	1.78	"
4/15/08	16	..	40000	2	6.50	1.60	"
4/23/08	34	..	54780	2	9.27	1.69	"
4/23/08	36	..	53500	2	8.66	2.04	"
4/27/08	30	..	46400	2	7.22	2.06	"
4/27/08	16	..	45000	2	6.82	2.18	"
5/ 4/08	36	..	60000	2	10.38	1.62	"
5/ 4/08	40	..	55600	2	8.92	2.20	"
5/ 4/08	16	..	40000	2	6.50	1.50	"
5/ 7/08	30	..	60900	2	10.36	1.82	"
5/ 7/08	44	..	60900	2	10.08	2.10	"
5/22/08	30	..	59700	2	9.62	2.32	"
5/22/08	44	..	48100	2	9.41	2.21	"
2/12/09	44	4608	43500	2	6.87	1.73	"
2/12/09	36	4662	45800	2	7.31	1.75	"
2/15/09	104	4566	42300	2	6.75	1.71	"
2/16/09	30	..	44500	2	7.40	1.50	"
6/ 5/09	44	4789	52700	2	8.75	1.79	"
6/ 8/09	40	4736	46500	2	7.52	1.78	"
6/14/09	38	4487	44000	2	7.30	1.50	"
6/18/09	40	5176	40000	2	6.06	1.94	"
6/19/09	40	6974	56300	2	8.65	2.61	"
6/24/09	38	6477	48100	2	7.19	2.43	"
5/27/09	30	5880	54800	2	8.97	2.21	G
6/25/09	40	4925	40000	2	6.15	1.85	Rankin
6/30/09	44	5783	41680	2	6.17	2.17	"
7/ 9/09	44	5783	42700	2	6.39	2.15	G
7/13/09	44	5009	40000	2	6.12	1.88	"
7/16/09	40	5768	44700	2	7.78	2.16	Rankin
7/23/09	44	5504	40400	2	6.02	2.06	"
7/29/09	40	5232	42400	2	6.62	1.86	"
195							
8/ 5/09	44	7628	54700	2	8.08	2.86	Rankin
8/ 7/09	RI 90657	6028	46600	2	7.06	2.26	"
8/11/09	40	5539	43100	2	6.54	2.08	"
8/18/09	44	5986	45800	2	6.92	2.24	"
8/20/09	40	5163	43200	2	6.70	1.94	"
8/26/09	30	4747	44200	2	7.00	1.78	"
8/30/09	44	5152	40000	2	6.07	1.93	"
9/ 2/09	40	5191	40000	..	6.05	1.95	"
9/11/09	40	5850	44400	..	6.69	2.19	"
9/15/09	44	6733	44200	..	6.31	2.53	"
9/20/09	30	5205	41500	..	6.35	1.95	"
9/24/09	40	5250	51100	.	8.25	1.97	"
9/27/09	34	5611	38000	.	5.37	2.23	"
9/28/09	44	4267	30700	..	4.64	1.50	"
10/ 2/09	40	5773	43000	..	6.45	2.15	"
"	34	5733	39300	..	6.42	1.50	"
10/ 5/09	44	6896	57000	..	8.90	2.50	"
10/ 8/09	38	5261	46200	..	7.27	1.97	"
10/ 9/09	30	3987	40000	..	6.50	1.50	"

10/13/09		40	5663	46500	..	7.20	2.10	"
"		34	5419	46000	..	7.17	2.03	"
10/14/09		44	5537	47200	..	6.36	2.08	
10/18/09		38	6250	46500	..	7.96	1.34	
10/27/09		30	5099	50260	..	8.14	1.91	
10/27/09		38	2319	40000	..	6.50	1.50	
"		44	7128	50900	..	7.51	2.67	
10/29/09		34	5389	59100	..	9.80	2.02	
10/29/09		40	6580	61300	..	9.79	2.47	
11/ 5/09		34	5891	47000	..	7.19	2.21	
"		44	5544	50400	..	8.00	2.08	
11/10/09		30	5575	50000	..	8.91	1.09	
"		40	5522	50100	..	8.95	1.07	
11/13/09		34	5779	50500	..	7.94	2.16	
"		44	8032	43100	..	5.61	3.01	
11/20/09		40	6848	47700	..	6.97	2.57	
"		38	4737	43300	..	6.88	1.78	
"		30	6870	54800	..	8.46	2.50	
11/30/09		30	5630	54500	..	8.79	2.11	
"		44	5379	50000	..	7.98	2.02	
12/ 2/09		34	5485	39300	..	5.80	2.06	
12/ 3/09		40	4739	48900	..	8.00	1.78	
12/ 4/09		38	4881	52300	..	8.63	1.83	
12/15/09		34	5369	49500	..	7.89	2.01	
12/16/09		30	5086	49600	..	8.01	1.91	
12/17/09		44	6907	47000	..	6.81	2.59	
12/21/09		40	4554	44900	..	7.28	1.70	
12/30/09		44	5444	52400	..	8.45	2.03	
"		34	5388	43600	..	6.70	2.02	
1/ 6/10		32	5067	43200	..	6.72	1.92	
"		40	5177	44700	2	7.00	1.94	Rankin
1/12/10		44	5086	52100	..	8.51	1.91	
"		34	6769	45700	..	6.60	2.54	
1/17/10		38	5216	50800	..	8.21	1.95	
1/20/10		32	5362	45000	..	6.99	2.01	
"		40	5418	54800	..	8.93	2.03	
1/26/10		34	5943	55600	..	8.89	2.23	
1/29/10		44	5680	53700	..	8.61	2.13	
196								
1/29/10		40	6781	61300	..	9.72	2.54	
2/ 7/10		32	5558	47100	..	7.24	1.68	
"		34	6504	55800	..	8.72	2.44	
2/11/10		40	6347	53100	..	8.24	2.38	
"		44	6326	52700	..	8.17	2.37	
2/28/10		44	3957	40000	..	6.52	1.48	
"		40	3577	40000	..	6.66	1.34	
3/ 5/10		32	3618	40000	..	6.24	1.76	
3/11/10		44	5251	46000	..	7.24	1.96	
7/ 2/09	RI	92701	4311	40000	..	6.38	1.62	
5/22/09	RI	92719	4025	41300	..	6.75	1.51	
6/21/09		16	4918	40000	..	6.16	1.84	

9/26/07	38	..	38900	2¢	2.92	4.86	"B"
9/30/07	40	..	36300	"	2.72	4.54	Rankin
3/30/08	38	..	42600	"	3.20	5.32	"
3/28/08	36	..	31500	"	2.36	3.94	"
3/30/08	16	..	38300	"	2.87	4.79	"
2/17/09	16	..	38600	"	3.00	5.00	"
"	40	..	55500	"	4.18	6.82	"
2/23/09	44	..	42400	"	3.06	5.10	"
3/ 5/09	16	..	42000	"	3.51	5.25	"
"	30	..	52100	"	3.91	6.51	"
"	40	..	53600	"	4.02	6.70	"
3/10/09	36	..	43400	"	3.26	5.42	"
"	44	..	55600	"	4.17	6.95	"
3/15/09	16	..	46000	"	3.45	5.75	"
"	30	..	40000	"	3.00	5.00	"
"	40	..	49800	"	3.74	6.22	"
3/24/09	36	..	29280	"	2.19	3.67	"
"	16	..	49200	"	3.69	6.15	"
"	40	..	42000	"	3.15	5.25	"
"	30	..	55000	"	4.31	6.87	"
3/31/09	38	..	38300	"	2.87	4.79	"
"	104	..	38300	"	2.87	4.79	"
4/ 3/09	36	..	31700	"	3.00	5.00	"
2/ 2/10	38	3913	40200	"	3.01	5.03	"

"Filed: Sept. 26, 1910. P. D. English, Clerk. By W. P. Sadler, D. C.

197 *Order.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday in May, A. D. 1910, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 7th day of November, 1910, a day of said term:

FOURCHE RIVER LUMBER COMPANY, Appellant,

vs.

BRYANT LUMBER COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

On motion this cause is set down for Oral Argument the 19th day of December, 1910.

198 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November, A. D. 1910, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 19th day of December, 1910, a day of said term:

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

This cause being regularly called, come the parties thereto by their Attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and upon oral argument, and is by the Court taken under advisement.

199 *Judgment Supreme Court.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November, A. D. 1910, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 20th day of February, 1911, a day of said term:

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, Second Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all its costs in this Court in this cause expended and have execution thereof.

200 *Orders.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November, A. D. 1910, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 6th day of March, 1911, a day of said term.

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

Comes the appellant by attorneys and files a petition for rehearing, and prays for two weeks' time in which to brief the same, which time is by the Court granted.

And on the 20th day of March, 1911, the following proceedings were had:
(Omitting Caption.)
On motion and for cause shown, the appellee is granted two weeks' time from date in which to prepare and file its briefs on the petition for rehearing herein.

And on the 3rd day of April, 1911, the following proceedings were had:
(Omitting Caption.)
The appellee's briefs and response to the petition for rehearing filed herein being filed, the said petition is submitted and by the Court taken under advisement.

201 *Petition for Rehearing.*

In the Supreme Court of Arkansas.

No. 1375.

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Petition for Reconsideration.

Appellant prays for a reconsideration of this cause because it says:
1. The court erred in holding that the contract between the parties

authorized a submission to arbitration of the question whether the appellee was entitled to receive on its shipments from its mill at Fourche the same divisions which were received by the Fourche River Valley & Indian Territory Railway Company on shipments of the lumber of appellant from the appellant's mill at Greytown.

2. The court erred in holding that if said contract is susceptible of such interpretation, it is valid and binding upon the parties, the appellant insisting that if that be the proper interpretation of said contract, said contract violates the terms of the Act of the Congress of the United States, entitled "An Act to Regulate Commerce", approved on the fourth day of February, 1887, and the various amendments thereto.

3. By the terms of the court's decision, the appellant is required to pay dividends only upon that part of the lumber of the appellee made from logs shipped over the line of the Fourche River Valley & Indian Territory Railway Company, and the evidence shows that of the lumber shipped out by appellee only a comparatively small part could have been manufactured from the logs shipped over the line of the railway aforesaid.

202 4. The court erred in holding that there was no error in the second instruction asked by the appellee and given by the court below.

5. The court erred in affirming the judgment of the court below in that the judgment of the court below authorizes and requires a violation of the "Act to Regulate Commerce", approved February 4th, 1887, and the acts amendatory thereto and supplementary thereof, on interstate shipments of the Bryant Lumber Company, the effect of the judgment being to give *to* interstate transportation at less than the published tariff rates applicable thereto.

Respectfully,

LUTHER M. WALKER,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Appellant.*

I certify that in my judgment the above motion is well taken in point of law.

G. B. ROSE.

Filed March 6, 1911.
P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *D. C.*

203 *Rehearing Denied.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November, A. D. 1910, at the Courthouse, in the

City of Little Rock, the following proceedings were had, to-wit: On the 10th day of April, 1911, a day of said term:

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

Being sufficiently advised, the petition for rehearing herein, is by the Court denied.

204 *Opinion.*

In the Supreme Court of Arkansas, February 20, 1911.

No. 169.

FOURCHE RIVER LUMBER CO.
v.
BRYANT LUMBER CO.

Statement by the Court.

The parties to this suit are rival lumber companies owning timber and timber lands in the same territory. To successfully operate it was necessary to build a railroad to convey the timber to their mills. One of the companies had secured a pass, the only one feasible for the construction of the road through the hills, located its line and procured a charter for the railroad and was successful in having a charter denied the other company by the State Board of Railroad Incorporators, which nevertheless commenced to build a railroad across and over the lands of the company owning the pass and having already a located line, and such action produced a controversy and a clash between them detrimental to the interests of both.

On the 3rd day of August, 1905, they entered into a contract, stating it was their desire "to settle their controversies in so far as they affect the future rights of any and all of the parties and their successors as to the building, maintaining and operating a railroad and the granting of rights of way, hauling freight, etc." And "mutually agreed to settle said controversy upon the terms set out."

The contract provided that the Fourche River Lumber Co. would cause the timber of the Bryant Lumber Co., owned and after acquired as shown by the Perry County records, to be hauled "when loaded on its cars and on its railroad by the Bryant Lumber Company," for a period of ten years by the Fourche River Valley & Indian Territory R. R. Co., or to a connecting carrier, without a transfer of freight from one car to another, at a price to be fixed
205 by arbitration under the contract; the connecting of the Bryant Lumber Company's tram roads or railroads with its

railroad and with the railroad of the F. R. V. & I. T. R. R., as built, or after constructed for hauling its timber, the hauling of its engines, cars and freights; that it would cause the perfecting of the organization of said F. R. V. & I. T. R. R. Co. whose articles of incorporation were on file in the office of the Secretary of State; and the acquiring and operation of the line of railroad referred to. It guaranteed the completion of the construction of the road called for within five years from the date of the granting of the charter, and that the work of construction should progress as rapidly as possible, one fifth of the part unconstructed to be built each year, it being understood that if an amount in excess of one-fifth shall be constructed one year, such excess may be deducted from what the company is required to build in a succeeding year, and further the Fourche River Co. agreed to pay any difference between the price charged by the railroad company for hauling the timber owned or afterwards acquired by the Bryant Lumber Company, and the price fixed for said service by the terms of the contract; and that said railroad company would perform the railroad service for which it (Fourche River) bound itself in this contract.

The Bryant Lumber Co. agreed to join with the incorporators of the said F. R. V. & I. T. R. R. Co. in an effort to secure the charter in accordance with the articles of association and map already filed in the Secretary of State's office. That said railroad company when incorporated could occupy the right of way now occupied by the railroad of the Fourche River Co. over the lands of the Bryant Lumber Co. for which it agreed to execute necessary deed of conveyance as soon as the incorporation was perfected. It also gave a free right of way over its lands owned or after acquired, for the
208 construction of the remainder of said road, and agreed that the Fourche River Co. should have free right of way over its lands owned or after acquired for building tram-roads to reach its timber.

There were several mutual agreements, a board of arbitration composed of Judge Robt. J. Lea and two other men, one to be selected by each of the parties, was provided for and given authority to settle certain matters and any other differences that arose between the parties as to the details of carrying out the contract, which authority with the propositions submitted for arbitration and the award thereon are set out in the complaint as follows:

"That the price for hauling future acquired timber of the Bryant Lumber Company over the railroad of the F. R. V. & I. T. R. R. Co. shall be fixed by a Board of Arbitrators, composed of Judge Robt. J. Lea and two other men, one to be chosen by each of the parties hereto, and said board shall have the authority to settle any other conditions that may arise between the parties hereto as to the details of carrying out this contract, such as hauling, loading and unloading of timber and other freight, the time when and the manner in which it is to be done, so that the Bryant Lumber Co., shall be secured against any discrimination in favor of the Fourche River Lbr. Co. in the transaction of its business. The Fourche Co. shall be required to carry timber and other freight

equally and impartially without discrimination for or against the Bryant Co., and it is understood that each party shall have such fair and equal opportunities, so that they can compete in all respects with each other in the purchase and holding of lands and other interests in that territory and on and with the railroad, and the Fourche Co. agrees that neither it nor the F. R. V. & I. T. R. R. Co. will do any act that will prevent the Bryant Lumber Co. from having a fair opportunity to compete with the Fourche
207 Co. in all respects in the purchase, holding and sale of lands and timber or products thereof in that vicinity, or in the transportation of freight over the said road."

That it had complied with all the terms, conditions and requirements of the contract, but that defendant did not comply with the contract on its part. That the Fourche River Lumber Co. refused to permit it to load its logs as the contract required, declining to put in a switch so that it might load its logs, refused to establish the switches or maximum grades of curves and curvatures for the building thereof, and refused to secure to plaintiff the same freight concessions from the Fourche River Valley & I. T. R. R. Co. that the defendant enjoyed, and that on April 17, 1907, it submitted the following proposition to be arbitrated:

"First. That the Bryant Lumber Company be permitted to load logs on the railroad on all places where the Fourche River Lumber Company have loaded and are loading logs, but Bryant Company shall load between 4 p. m. and 9 a. m. of the next day.

Second. That the unloading switch on the Fourche River be put in at once.

Third. That the maximum for grades and curvatures for the building of switches be established at once.

Fourth. That the Fourche River Lumber Company through the Fourche River Valley & Indian Territory Railroad Company shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same freight concessions as are now enjoyed by the Fourche River Lumber Company, through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company.

That the Board of Arbitrators met on the 24th day of October, 1907, both plaintiff and defendant being present and rep-
208 resented by attorneys, and made the following award:

. The arbitrators grant the first demand with the proviso that all cars be loaded between 4 p. m. and 9 a. m. of the next day.

On the second and third propositions, the Board rule that the maximum curve shall be twelve degrees and the maximum grade of switches be 1½% (one and one half per cent), except where there is a reversed curve, when it may be two per cent, and that the Fourche River Lumber Company be required to lay the iron on the unloading switch at Fourche River whenever the ties are laid and these grades and curves are conformed to. This and all other switches are to have proper rises and dumps at the end to prevent cars running off.

The Fourche River Lumber Company protests against the arbi-

trators taking jurisdiction of the fourth proposition on the ground that it is beyond the terms of the submission; but the board (Mr. Grayson dissenting) overrules the objection, and rules that the Fourche River Lumber Company be required to pay the Bryant Lumber Company the same differentials that the Fourche River Valley & I. R. Rd. receives on interstate shipments of the Fourche River Lumber Company, to which ruling the Fourche River Lumber Company excepts.

(Signed) ROBERT J. LEA.
W. GRAYSON.
C. W. LEWIS."

That both parties submitted said proposition and all differences and disputes in reference thereto to the arbitrament and final determination of said Judge Robt. J. Lea, W. Grayson and C. W. Lewis, chosen as provided in the contract between the parties, and that they arbitrated and determined concerning the controversy and conditions between the parties as declared in the award set out.

The plaintiff duly performed all the conditions of said award on its part, or offered to do so, but the defendant then and ever since has refused to perform the award on its part. That because
209 of the failure of defendant to perform the award on the fourth proposition by paying to it the same differentials that it received from the Fourche River Valley & I. T. R. Co. on through rates over the Rock Island, it was damaged in the sum of $2,845.20, which sum it claimed with interest at 6%.

That defendant refused to comply with the award made on the first proposition, and removed its track so that it could not comply with it, and that plaintiff was damaged thereby in the sum of $1500.

That on the second proposition and award, defendant refused and failed to comply with it, and by such failure plaintiff was damaged in the sum of $2500, and prayed judgment for $6845.20 with interest.

Defendant denied that plaintiff complied with all the terms, conditions and requirements of the contract set out, and that it failed to comply with any part of said contract binding upon it. That it had refused to permit the plaintiff to load its logs as the contract required; that it had declined to put in any switch which it was required to put in under the contract; also denied that it had refused to establish the maximum for curves and curvatures for the building of switches; that it had refused to secure the plaintiff any freight concessions from the F. R. V. & I. T. R. R. Co. which that company could lawfully grant which were contemplated in the contract between the parties. It denied that the fourth proposition submitted to the Board of arbitrators set out in the complaint was within the terms of the submission to arbitration at the time, that the Board of Arbitration and authority to make the award thereon set forth in the complaint. It denied that the defendant wrongfully removed any portion of the track of said railroad company; demurred to that part of the complaint seeking damages for the

refusal of defendant to perform the fourth item in the award
210 of arbitrators and to pay the plaintiff the differentials received by the Fourche River Lumber Co., on the plaintiff's logs, which demurrer was overruled, and the plaintiff excepted.

The contract between the parties, portions of which have already been stated, and set out in the complaint, was introduced and read in evidence. The evidence tended to show that the Fourche River Valley & I. T. Rd. Co. (hereafter called the Territory Ry.) had a traffic arrangement with the Rock Island embracing lumber and timber, by which the Territory Ry. received a division of the through rate for freight originating on its lines, which it had enjoyed since 3 or 4 months after it began operating trains. The amount of division allowed that company is 2 cents to Memphis, 3 cents to Thebes or St. Louis, and 3½ cents to Oklahoma points. This was allowed to it out of the through rate published and only for lumber originating on its line. The Fourche River L'b'r Co's. plant is on the Territory Ry., about a mile from the Rock Island R. R. where its timber is manufactured and comes to the latter road as lumber. The traffic manager of the Rock Island testified that the mill of the Bryant Lumber Co, was on the Rock Island, a short distance from the junction of the Territory Ry. and that the lumber when shipped out would take the interstate published rate from the point of shipment, the location of its plant; that it charged the Bryant Lumber Co. $2.00 a car for switching from the Territory Ry.

The award as set out in the complaint was also introduced in evidence. The testimony tended to show that appellee asked for the construction of an unloading switch that it might dump logs into the river; that it cleared the right of way and built the embankment or dump therefor and put the ties thereon, and that the Fourche River L'b'r. Co. refused to lay iron upon it in accordance with its agreement under the contract; claiming that it was not built
211 as it should have been; that the grade was changed from what was first given the engineer and the dump was constructed in accordance with the change as made; that the work in the construction of this proposed switch cost the Bryant Lumber Co., $1100 and that it had been compelled to pay for hauling logs from the Rock Island $582.00 that it expected to unload on this switch and float down the river, if it had been constructed. That after the award was made, the company still declined. It was shown that the embankment practically complied with it, and the Fourche Co. still refused to build the switch, and denied that it would do so even if it were finished according to the award as understood by it. That the appellee was damaged in the sum of $550 and $300 because of its failure to build these two switches in section 27. That the Fourche River Co. built an extension to the end of the Territory Ry. Co. on the dump or embankment and right of way already constructed for the extension of said Territory R. R. Co. beyond Camp and hauled its longs over said extension, and notwithstanding the award on this point, took up its said track and declined and refused to allow appellee company to haul its timber

thereon, and that appellee lost some of its timber, not being able to remove it within the time limit in the contracts, and was compelled to pay out to the contractor $500 in order to secure a release from him for its failure to perform a contract with him to pay for delivery of logs to be hauled over that part of the railroad, and that certain of its timber delivered there for transportation was destroyed, there being no other way to bring it out. That under the terms of the contract with the Fourche River L'b'r. Co. it was bound to have caused the construction of the said Territory Railroad beyond this point, Camp, to the end of the said extension by the Fourche Co. and further, before this time. That the officers and stockholders of the Fourche River Lumber Co. are the same
212 as the officers and stockholders of the said Territory Ry. Co., except that maybe there are two or three minor stockholders in said railroad, possessing one share each. That said railroad gets a division of the through rate on all shipments of lumber of the Fourche River L'b'r. Co., from its mills to the markets outside the State; that such divisions are 2 cents to Memphis, 3 cents to Thebes or St. Louis and 3½ cents to Oklahoma points; that the Fourche River Lumber Co. protested against the submission of this point relating to these divisions of rates to the arbitrators and denied the authority of the arbitrators to pass upon it under the contract, and refused absolutely to perform the award after it was made.

That the Bryant Lumber Co. shipped certain cars of lumber from its mill manufactured from timber hauled over the said Territory Railroad. "The cars came off the line of the Indian Territory Railroad" as one witness expressed it—containing a little over 13¼ million pounds upon which a division or pay from the Fourche Company was claimed and figured at 2 cents, amounting to $2650.35. That nearly all of this lumber went to Oklahoma points and the remainder to Kansas and Missouri.

The jury returned a verdict in favor of the Bryant Lumber Co. for $3978.00, and the Fourche River L'b'r. Co. appealed.

Opinion.

KIRBY, *J.* (after stating the facts):

First. It is contended that there was no testimony to support the verdict as to damages for delay in building the two switches in Section 27, but there was shown to have been delay in the building of these switches caused by appellant, and the Manager of the Bryant Lumber Company swore that it was damaged by reason of such delay in the sum of $550 for the one, and in the sum of $300 for the other. His statement was introduced without
213 objection and without any exception saved and preserved in the motion for a new trial and appellant thereby waived any right to complain of the testimony here. Texas & St. Louis Ry. Co. v. Kirby, 44 Ark. 103; Mt. Nebo Anthracite Coal Co. v. Williamson, 73 Ark. 530; Ince v. State, 77 Ark. 418; Planters Mut. Ins. Assn. v. Hamlin, 77 Ark. 27. Having been permitted to go to the jury

without objection or cross examination of the witness and not excluded on motion as it could have been done, it will be presumed that there were matters and facts upon which to base the estimate which an examination would have disclosed, and the jury were authorized to weigh it accordingly.

2nd. As to failure to complete the unloading switch, there was conflict in the testimony, but there was testimony from which the jury might have found that the dump and embankment was constructed in substantial compliance with the award of the arbitrators; that appellant refused to complete it after such award, and stated that it would not do so without regard to its construction if built in exact accord with the finding of the arbitrators. This being true, there was no necessity for any tender of further performance by appellee. An offer to perform by appellee would have been useless, as shown by the testimony, and it was not necessary to make it. It was waived by appellant's conduct. S. Co. v. Jester, 13 Ark. 437; Hunt on Tender, secs. 55-6; Blunter v. Dewees, 79 Texas 272; Bank of Colorado v. Fargo, 74 N. W. 1057; Union Central Life Ins. Co. v. Caldwell, 68 Ark. 505, 521.

The testimony to the damage by reason of the failure to construct this switch was also conflicting. It was stated, however, by one witness, that the company had cleared the right of way and built the embankment at a cost of $1100 and had supplied two carloads of ties that were worth from 16 to 18 cents each. No objec-
214 tion was made to the introduction of this testimony, and while it was contradicted by that of the engineer in the estimate of how much work was actually done, and how much it ought to have cost to do it, the jury found in favor of appellee on the point.

3rd. Since appellant was bound by the terms of its own contract first made to have a railroad constructed beyond the point, Camp, to where appelle- tendered its logs for shipment and before that time, and since it had in fact constructed a railroad over the right of way and embankment of the said Territory Ry. Co., over which it was having its own logs hauled and those of appellee could have been by it transported, it was bound by the terms of the contract and the award to receive said logs there, and liable for the resultant damage for refusing to do so. The testimony showed that there was no other way to get the timber out than over this road; that a large amount of it was lost and destroyed and that the Bryant Company was compelled to pay $500.00 for the release from the person with whom it had contracted for the delivery of the timber because of its breach of contract in not permitting it to be performed. The witness Faisst estimated the company's damage on this point at $1500.00, without objection after stating the items and facts upon which it was based and the elements entering into it.

4th. We hold that the point submitted to arbitration was within the scope and purview of the contract made between the parties, and the award having been made, appellant was bound to its performance and liable in damages for its failure. It secured valuable rights by this contract, upon the theory that both companies should

be placed in like condition on equal terms for the delivery of timber and sale of lumber manufactured from timber shipped over said road, that was and is in fact owned by the same persons
215 who own the appellant company with which this original contract was made. Since they in effect have an advantage in the sale of lumber, the timber for the manufacture of which comes over said Territory Railroad, of the division received by said company as an originating line from the connecting carrier, we see no reason why appellant should not pay to appellee company an amount equal thereto upon its lumber manufactured from logs delivered over said road as the arbitrators have found that they should do. There was testimony on this point, showing the amount of $2650.35, figured, at a less rate than the division of rates shown to be received by said Territory Railway.

Nothing is being asked from the Territory Railway Co. in this suit and only a performance of its contract by appellant in accordance with the award made thereon under its terms. The verdict of the jury was for the lump sum of $3978.00 damages, a little more than half of the amount claimed, for all the injuries complained of, and there was no finding of any sum on any separate claim made under the award. It shows that the jury did not accept the largest statement of damage of any witness, and the testimony is sufficient to sustain their verdict.

The adjudgment is affirmed.

216 *Clerk's Certificate.*

STATE OF ARKANSAS, *ss:*

In the Supreme Court.

I, Peyton D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Bryant Lumber Company, Plaintiff, vs. Fourche River Lumber Company, Defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this May 6th, 1911.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

217 In the Supreme Court of Arkansas.

No. 1375.

FOURCHE RIVER LUMBER COMPANY, Appellant,

vs.

BRYANT LUMBER COMPANY, Appellee.

Assignment of Errors.

Now comes the Fourche River Lumber Company, appellant in the above entitled cause, by G. B. Rose and Luther M. Walter, its attorneys, and says that in the record, proceedings and judgment in the above entitled cause, which judgment was entered on or about the — day of —— 19—, there is manifest error which operated to the prejudice to the rights of the said appellant in said cause, in this:

First. The court erred in holding that the contract between the parties authorized a submission to arbitration of the question whether the appellee was entitled to receive on its shipments from its mill at Fourche the same divisions which were received by the Fourche River Valley & Indian Territory Railway Company on shipments of the lumber of the appellant from the appellant's mill at Greytown.

Second. The court erred in holding that if said contract is susceptible of such interpretation, it is valid and binding upon the parties, the appellant insisting that if that be the proper interpretation of said contract, said contract violates the terms of the Act of the Congress of the United States, entitled "An Act to Regulate Commerce," approved on the fourth day of February, 1887, and the various amendments thereto.

Third. By the terms of the Court's decision, the appellant is required to pay divisions only upon that part of the lumber of the appellee made from logs shipped over the line of the Fourche River Valley & Indian Territory Railway Company and the evi-
218 dence shows that of the lumber shipped out by appellee only a comparatively small part could have been manufactured from the logs shipped over the line of the railway aforesaid.

Fourth. The court erred in holding that there was no error in the second instruction asked by the appellee and given by the court below.

Fifth. The court erred in affirming the judgment of the court below in that the judgment of the court below authorizes and requires a violation of the "Act to Regulate Commerce," approved February 4th, 1887, and the acts amendatory thereto and supplementary thereof, on interstate shipments of the Bryant Lumber Company, the effect of the judgment being to give it interstate transportation at less than the published tariff rates applicable thereto.

Wherefore the said appellant prays that the said judgment of the Supreme Court of Arkansas may be reversed.

G. B. ROSE,
LUTHER M. WALTER,
Its Attorneys.

219 *Petition for Writ of Error.*

In the Supreme Court of Arkansas.

FOURCHE RIVER LUMBER COMPANY, Appellant,
v.
BRYANT LUMBER COMPANY, Appellee.

To the Honorable Chief Justice of said Court:

The appellant, the Fourche River Lumber Company, prays a writ of error to the Supreme Court of the United States in this cause, and it files herewith its assignment of errors.

LUTHER M. WALTER,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *For Appellant.*

220 *Allowance of Writ of Error.*

In the Supreme Court of Arkansas.

FOURCHE RIVER LUMBER COMPANY, Appellant,
v.
BRYANT LUMBER COMPANY, Appellee.

Order.

It is ordered that the appellant be allowed a writ of error to the Supreme Court of the United States upon its giving supersedeas bond in the sum of Six Thousand Dollars.

This 24th day of April, 1911.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

221 In the Supreme Court of Arkansas.

FOURCHE RIVER LUMBER COMPANY, Appellant,
vs.
BRYANT LUMBER COMPANY, Appellee.

Bond.

Know all men by these presents, That we, Fourche River Lumber Company, as principal, and Home Accident Insurance Company, as surety are held and firmly bound unto the Bryant Lumber Company in the full and just sum of Six Thousand Dollars, to be paid to the said Bryant Lumber Company, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and

dated this 24th day of April, in the year of Our Lord one thousand nine hundred and eleven.

Whereas, lately at a Supreme Court of the State of Arkansas, in a suit pending in said Court, between Fourche River Lumber Company and the Bryant Lumber Company, et al., a decree was rendered against the said Fourche River Lumber Company, and the said Fourche River Lumber Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Bryant Lumber Company and T. M. Mehaffy, its attorney citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof.

Now, the condition of the above obligation is such, That if the said Fourche River Lumber Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to
222 make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FOURCHE RIVER LUMBER CO.,
By F. H. HARTSHORNE,
Secretary [SEAL.]

[SEAL.] HOME ACCIDENT INSURANCE CO.,
By A. M. BANKS, *President.* [SEAL.]

Sealed and delivered in presence of:

CHAS. DAVIDSON,
E. L. THRASH,
As to Fourche River Lumber Co.

Approved by:

E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas.

223 *Writ of Error.*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings as *was* in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arkansas, before you, or some of you, being the highest court of law of the said State in which a decision could be had in the said suit, between the Fourche River Lumber Company, defendant and plaintiff in error, and Bryant Lumber Company plaintiff and defendant in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title privilege or exemption specially set up or claimed under such statute, a manifest error hath happened to the great dam-

age of the Fourche River Lumber Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 24th day of May, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 24th day of April, 1911.

[The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

W. P. FEILD,
Clerk United States Circuit Court, East. District of Arkansas, West. Division.

Allowed by

E. A. McCULLOCH,
Chief Justice of Supreme Court of Arkansas.

224 *Certificate of Lodgment.*

SUPREME COURT,
State of Arkansas, ss:

I, Peyton D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on May 4th, 1911, in the matter of the Fourche River Lumber Company, versus the Bryant Lumber Company.

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for *each* defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Little Rock, Arkansas, this May 6th, 1911.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

225 *Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to The Bryant Lumber Company and T. M. Mehaffy, its Attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Arkansas, wherein Fourche River Lumber Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 24 day of April A. D., 1911, and of the Independence of the United States, the one hundred and thirty-fifth.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Attest:

[The Seal of the Circuit of East. Dist. Ark., Western Division, U. S. A.]

W. P. FEILD, *Clerk.*

Service of the within citation and receipt of a copy thereof admitted, this 4th day of May, 1911.

T. M. MEHAFFY,
R.,
Attorney for Bryant Lumber Company, Appellee and Defendant in Error.

226 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this May 6th, 1911.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

Costs.

Costs in Circuit Court	$29.15
" " Supreme Court	$81.50
Making Transcript for the U. S. Supreme Court etc	$63.00

Endorsed on cover: File No. 22,685. Arkansas Supreme Court. Term No. 296. Fourche River Lumber Company, plaintiff in error, vs. Bryant Lumber Company. Filed May 19th, 1911. File No. 22,685.

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Supreme Court of the United States

October Term, 1912.

No. 296.

FOURCHE RIVER LUMBER COMPANY,
Plaintiff in error,

vs.

BRYANT LUMBER COMPANY,
Defendant in error.

In error to the Supreme Court of the State of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This case comes here on writ of error from a decision of the Supreme Court of the State of Arkansas, affirming a judgment of the Circuit Court of Pulaski County. The suit arose out of an award by arbitrators pursuant to the terms of a contract, dated August 3, 1905. The award sued upon amounted to $6,845.20. Trial was had to a jury, which returned a verdict of $3,978.00. Petition for reconsideration was denied by the Arkansas Supreme Court. It is to reverse the judgment of the Supreme Court of Arkansas that this writ of error has been taken.

By contract of August 3rd, 1905, (Record 39) the Fourche River Lumber Company agreed to cause timber to be hauled off the lands of the Bryant Lumber Company at a rate of 37½c per thousand feet, and further agreed to incorporate the Fourche River Valley & Indian Territory Railroad Company as a common carrier, and to build a railroad as per provisions in the charter and the preliminary survey then on file in the office of the Secretary of State. It was mutually agreed between the parties that the price for hauling future acquired timber of the Bryant Lumber Company should be fixed by the arbitrators. Further, that timber and other freight should be carried "equally and impartially and without discrimination" for or against the Bryant Company. It was further understood that each party should have fair and equal opportunity so that they could compete in all respects in the manufacture and sale of lumber. Under the contention that the Fourche River Lumber Company through its ownership of the Fourche River Valley & Indian Territory Railway Company, was, by reason of a division of the joint rates upon lumber, securing a freight concession out of the through rate, the Bryant Lumber Company, among other things demanded that it be given "the same freight concessions" as were then being paid to the Fourche River Valley & Indian Territory Railroad Company. Notwithstanding, protest was made by plaintiff in error that this matter was not within the scope of arbitration under the contract, a majority of the arbitrators granted this demand of the Bryant Lumber Company.

The Circuit Court instructed the jury in the suit brought to enforce the award (Record 104).

> The court instructs the jury that by the terms of the contract and that by the findings of the Board of Arbitration, to which the same was submitted, the defendant Lumber Company, was required to pay to the Bryant Lumber Company, the same differentials that the Fourche River Valley & Indian Territory Railway Co. received on interstate shipments with the Fourche River Lumber Company, and if you find from the testimony that the Fourche River Valley & Indian Territory Railway Co. has received and been receiving, certain differentials from the Rock Island Railroad on interstate shipments, and that the Fourche Lumber Co. has not paid to the Bryant Lumber Company the same differentials on Lumber that the Bryant Lumber Company has shipped to the same territory, you are instructed that the defendant is indebted to the Bryant Lumber Company in the amount of any such differentials, which it has not paid, as may be shown by the proof.

To this instruction the defendant saved an exception (Record 105). Request was made by the defendant to instruct the jury as follows, (Record 107).

> You are instructed that the payment to plaintiff the differentials provided for in the fourth paragraph of the award of the arbitrators would be the granting to plaintiff of a rebate forbidden by law, enabling the plaintiff to transport its goods at less than the tariff rates, and you will find for the defendant on that issue.

The Court refused the request and to such refusal an exception was saved (Record 107). Motion for new trial was filed alleging that the Court had erred in giving instruction, among others, number two, and in

refusing to give, among others, instruction requested number five (Record 108). Motion for new trial was overruled, (Record 109). The opinion of the Court below upon the fourth point submitted to the Arbitrators which involves the construction of the Act to Regulate Commerce is short and we quote it in its entirety (Record 124).

> We hold that the point submitted to arbitration was within the scope and purview of the contract made between the parties, and the award having been made, appellant was bound to its performance and liable in damages for its failure. It secured valuable rights by this contract, upon the theory that both companies should be placed in like condition on equal terms for the delivery of timber and sale of lumber manufactured from timber shipped over said road, that was and is in fact owned by the same persons who own the appellant company, with which this original contract was made. Since they in effect have an advantage in the sale of lumber, the timber for the manufacture of which comes over said Territory Railroad, of the division received by said company as an originating line from the connecting carrier, we see no reason why appellant should not pay to appellee company an amount equal thereto upon its lumber manufactured from logs delivered over said road as the arbitrators have found that they should do. There was testimony on this point, showing the amount of $2650.35 figured, at a less rate than the division of rates shown to be received by said Territory Railway.

The assignments of error in this Court are five in number which are covered fully by assignments number four and five, which are (Record 126).

Fourth. The Court erred in holding that there was no error in the second instruction asked by the appellee and given by the Court below.

Fifth. The Court erred in affiirming the judgment of the Court below, in that the judgment of the Court below authorizes and requires a violation of the "Act to Regulate Commerce," approved February 4th, 1887, and the acts amendatory thereto and supplementary thereof, on interstate shipments of the Bryant Lumber Company, the effect of the judgment being to give it interstate transportation at less than the published tariff rates applicable thereto.

ARGUMENT.

These assignments of error involve the following propositions of law:

1. *The contract of August 3rd, 1905, became invalid as to the rate for transportation of logs when tariffs were filed by the Fourche River Valley & Indian Territory Railroad Company prescribing another and different rate from the contract price.*

2. *The award of the arbitrators and the judgment of the Court awarding damages equal to the amount of the division of the joint rate received by the Fourche River Valley & Indian Territory Railroad Company constitutes a device whereby the Bryant Lumber Company is given transportation at less than the published interstate rates.*

3. *The Interstate Commerce Commission alone has jurisdiction in the first instance to require establishment of switch connection or award damages for failure to make such connection or damages for unjust discrimination.*

STATEMENT OF FACTS.

The Fourche River Lumber Company, prior to August, 1905, had constructed a railroad in accordance with its charter which authorized the building of a railroad and the carriage of freight and passengers for the Fourche River Lumber Company and also *for the general public.* A dispute arose between the Bryant Lumber Company and the Fourche River Lumber Company as to the right of the latter to occupy a pass which the former alleged was owned by it. After more or less litigation and trouble, an agreement was made, dated August 3, 1905, (Record 39) whereby difficulties were adjusted and the parties agreed upon certain terms as to building, maintaining and operating the railroad, granting of rights-of-way and the price for hauling logs and lumber. In substance this contract provided for three things:

1. Transportation of the logs owned by the Bryant Lumber Company.
2. Building of railroad.
3. Rights of the respective parties so far as transportation was concerned.

As to the first matter it was provided that the timber of the Bryant Lumber Company then owned should be hauled at the rate of 37½c per thousand feet. Logs thereafter acquired during a period of ten years should be hauled at a price to be fixed by arbitration as provided in the contract.

As to the second matter the Fourche River Lumber Company agreed to perfect the incorporation of the Fourche River Valley & Indian Territory Railroad Company and to build a railroad in extension of the existing railroad of the Lumber Company as per

preliminary survey then on file in the office of the Secretary of State of Arkansas. The Bryant Company agreed to join with the Fourche Company in the application for the charter.

It was further agreed that a Board of Arbitrators should have the right to settle any differences that arose between the parties as to the details of carrying out this contract such as

> hauling, loading and unloading of timber and other freight, and the time when and the manner in which it is to be done, so that the Bryant Company shall be secured against any discrimination in favor of the Fourche Company in the transaction of its business; and the Fourche Company shall be required to carry timber and other freight equally and impartially without discrimination for or against the Bryant Company. And it is understood that each party shall have such fair and equal opportunities, so they can compete in all respects with each other in the purchase and holding of the lands, timber and other interests in that territory and on and with the railroad. And the Fourche Company agrees that neither it nor the Fourche River Valley & Indian Territory Railroad Company will do any act that will prevent the Bryant Lumber Company from having a fair opportunity to compete with the Fourche Company in all respects in the purchase, holding and sale of lands or timber or the products thereof in that vicinity, or in the transportation of freight over said road; but this shall not preclude the right of the Fourche Company to actively prosecute its mill business or to buy and sell lands and timber or the products thereof as it deems proper. And when said arbitrators shall agree upon the

> said price, or agree as to any other matter of difference submitted to them as above provided, their decision shall immediately become a part of this contract, binding upon the parties as if originally written herein; and the parties agree that such decision shall be signed by each of them and attached to the original draft of this contract as a part hereof; and to the end that a practical working arrangement between the parties be made, if any dispute or difference arise in interpreting the finding of the Board, the parties agree that such matter shall be referred again for further adjudication or explanation until the decision of the arbitrators is plain, and a practical working arrangement is perfected.

In accordance with this contract the Fourche River Lumber Company secured the incorporation of the Fourche River Valley & Indian Territory Railroad Company, conveyed to it the railroad and equipment then owned by the Fourche River Lumber Company and took in exchange therefor the stock in the railroad company.

On April 17, 1907, the Bryant Lumber Company submitted to the Fourche River Lumber Company in writing four propositions to be arbitrated in accordance with the contract. The first proposition related to the loading of logs by the Bryant Company. The second related to the establishment of an unloading switch on the Fourche River. The third related to the establishment of maximum grades and curvatures of switches. The fourth proposition was (Record 43)

> That the Fourche River Lumber Company, through the Fourche River Valley & Indian Territory Railroad Company shall secure to the

> Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same freight concessions that are now enjoyed by the Fourche River Lumber Company through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company.

The Board of Arbitrators met October 24, 1907, and made the award set forth as Exhibit B to testimony of witness Faisst (Record 43). As to the fourth demand by the Bryant Lumber Company the Arbitrators found,

> The Fourche River Lumber Company protests against the arbitrators taking jurisdiction of the fourth proposition on the ground that it it is beyond the terms of the submission; but the board (Mr. Grayson dissenting) overruled the objection, and rules that the Fourche River Lumber Company be required to pay to the Bryant Lumber Company the same differentials the Fourche River Valley & Indian Territory Railway receives on interstate shipments of the Fourche River Lumber Company; to which ruling the Fourche River Lumber Company excepts.

Alleging that the Fourche River Lumber Company had failed to comply with the award of the arbitrators, the Bryant Lumber Company brought suit alleging damages on each of the first, second and fourth propositions in amounts of $1500.00, $2500.00 and $2845.20, respectively.

The trial developed the following facts:

The Fourche River Valley & Indian Territory Railroad Company connects with the Rock Island Railroad at Bigelow. Joint through rates to interstate destina-

tions were established, published and filed with the Interstate Commerce Commission upon all forest products. Out of the joint through rate the Fourche River Valley & Indian Territory Railroad Company received for its part of the haul amounts ranging from 2c. to 4c. per hundred pounds (Record 75). This division of 2c. to 4c. covered the cost of hauling the logs to the mill of the Fourche River Lumber Company and the transportation of the manufactured lumber from the mill to Bigelow. Three cars of logs make one car of lumber. This division of the joint through rate was paid by the Rock Island to the Fourche River Valley & Indian Territory Railroad Company and to no other party. The Bryant Lumber Company shipped from its mill at Fourche to interstate destinations over the Rock Island Railroad and its connections 13,251,759 pounds. At 2c. per hundred pounds the differential amounts to $2,650.35. This 13,251,759 pounds of lumber was manufactured at Fourche on the line of the Rock Island Railroad from logs hauled over the Fourche River Valley & Indian Territory Railroad to the Rock Island Railroad and thence to Fourche, from logs moving over the Rock Island Railroad alone, from logs floated in by river and from logs hauled in by wagon. All logs from these four sources were placed in the pond of the Bryant Lumber Company and no effort was made to keep separate the logs received from any one of these four sources. (Record 27). The Bryant Lumber Company received 291 cars of logs hauled over the Fourche River Valley & Indian Territory Railroad to Bigelow, thence via the Rock Island to Fourche, (Record 38). There were no joint through rates from

Fourche River Valley & Indian Territory Railroad points on logs milled at Fourche on the Rock Island. (Record 18, 19). The Fourche River Valley & Indian Territory Railroad extends from Bigelow to Belleview, a distance of 14.8 miles. The railroad is well built of 56 and 60 pound steel. The manager of the Railroad Company is not an employee of the Fourche River Lumber Company and the railroad is operated separate and apart in every respect from the Lumber Company. The stockholders of the Fourche River Valley & Indian Territory Company are, with one or two exceptions, the stockholders of the Fourche River Lumber Company (Record 73). The Railroad Company keeps a separate set of books and accounts; has its own bank account and employees, and is in every sense an independent, separately operated common carrier. (Record 75). The Interstate Commerce Commission in its recent *Tapline decision* held that the Fourche River Valley & Indian Territory Railroad is a common carrier as to all traffic and entitled to participate in joint rates, (23 I. C. C. 277, 549 and 564). There are a number of shippers of lumber and forest products from various points on the line of railroad of the Fourche River Valley & Indian Territory to interstate destinations (Record 77). The railroad hauls merchandise, live stock, emigrant outfits, logs and lumber (Record 78). Trains are operated, two round trips daily, freight and passenger cars mixed in the same train. The average number of feet of lumber in one car of logs is 5,327 feet. A car of lumber averages 15,725 feet. Three cars of logs would make one car of lumber (Record 93). Figured on basis of differentials on all shipments to date of

trial Bryant Lumber Company claimed $5,315.54 (Record 102). The jury returned a verdict for $3,978.00.

1. *The contract of August 3, 1905, became invalid as to the rate for transportation of logs when tariffs were filed by the Fourche River Valley & Indian Territory Railroad Company prescribing another and different rate from the contract price.*

This Court has repeatedly decided that contracts, however lawful when made, become unlawful when, by reason of tariff schedules on file with the Interstate Commerce Commission, the rate becomes different or other than that provided for in the contract. The first important announcement of this Court to that effect was in the case of *Armour Packing Company vs. United States*, 209 U. S., 56. The latest decision of the Court is the case of *Chicago & Alton v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033. In that case, the Chicago & Alton Railroad made a special contract to carry a carload of horses from Springfield to Joliet, Illinois, and there deliver to its connection so that the car would be carried on a fast stock train, known as the "horse special" over the Michigan Central Railroad through to New York. This Court held, after citing the third and sixth sections of the Act to Regulate Commerce and the Elkins Act, that the Railroad Company, by entering into an agreement for expediting the shipment took on a liability different and more burdensome than would exist without such a special contract; that for such a special service and higher responsibility it might make a higher rate, but that such a rate must be published and open to all; that the shipper was contracting for an advantage in the undertaking to carry by expedited

train, which advantage was not extended to all others; that such an advantage should be published in the tariffs and that for a breach of such a contract relief will be denied because the allowance therefor, without such publication, is a violation of the Act to Regulate Commerce, as well as illegal because an undue advantage. After citing the decision in the *Armour Packing Company case*, Mr. Justice Lurton proceeds:

> The broad purpose of the commerce act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs.

It is particularly important to note that the contract sued upon in the case at bar covers a number of obligations and undertakings on the part of each, and all the undertakings of one constituted the consideration for the undertakings of the other party to the contract. Now, when the logs began to move over the Fourche River Valley & Indian Territory Railway Company, transit to interstate destination was begun; this is so because logs change their form, being milled in transit at Fourche on the Rock Island and proceeding thence to the interstate market in the form of lumber. Section 6 of the Act to Regulate Commerce requires, in the absence of joint interstate rates, the publication and filing with the Commission of the separately established rate applicable for the

portion of the interstate transportation performed over the line of each separate carrier not party to the joint rate. The regular published tariff rate covering the movement of logs over the Fourche River Valley & Indian Territory Railroad Company is two cents per hundred pounds (Record 111). Of this amount the Fourche River Lumber Company was required to pay the charges set forth in the prepaid column (Record 111) and the Bryant Lumber Company paid the amount shown in the collect column. Every shipper other than the Bryant Lumber Company paid the full published tariff rate. The clear result of such a contract is to give transportation at less than the published rates and to give an undue advantage; the contract is therefore unlawful.

2. *The award of the arbitrators and the judgment of the court awarding damages equal to the amount of the division of the joint rate received by the Fourche River Valley & Indian Territory Railroad Company constitutes a device whereby the Bryant Lumber Company is given transportation at less than the published interstate rates.*

The decision of this Court in the *Union Stock Yards & Transit case*, 226 U. S. 286, completely covers the situation under the award for damages in the matter of differentials. In the Stock Yards case, the owners of the Union Stock Yards & Transit Company and the railroad operated by the Chicago Junction Railway, made a contract whereby in consideration of the Pfaelzers locating a packing plant at the Union Stock Yards, and maintaining the same for fifteen years, payment would be made to the Pfaelzers of $50,000.00. The freight charges annually on the business of the

Pfaelzers amounted to about $2800.00. This Court said as to the contract:

> By Sec. 2 of the Act to Regulate Commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins act makes it an offense for any person or corporation to give or receive any rebate, concession, or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff, or whereby any other advantage is given or discrimination is practised. By the very terms of the contract it is evident that the interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfaelzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive $50,000, and it obligates them to maintain and operate the plant for a period of fifteen years, and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so brought, to pay the regular charges thereon as if the same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of $50,000, with the bonus given to the Pfaelzers for the location of their plant in jux-

> taposition to the stock yards. The only interest which the Stock Yard Company has in Pfaelzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Company in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered, without any rebate or concession. Another Company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus, there has been an undue advantage given to and an unlawful discrimination practised in favor of Pfaelzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins act as to departures from published rates,—and we must consider the case in that light,—and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the interstate commerce law and the Elkins act to prevent favoritism by any means or device whatsoever, and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the commerce court should have enjoined the carrying out of this contract.

In all cases the courts have guarded with zealous care any inroad upon the plan for equality established by Congress under the Act to Regulate Commerce. Every arrangement, contract or agreement whereby in any degree or in any manner freight charges for one shipper are lessened from the published rates on file with the Commission, has been held

unlawful. The Court below orders refunded to the Bryant Company two cents per hundred pounds on all shipments of lumber moving from Fourche to interstate destinations. While the judgment below is against the Fourche Lumber Company, the record clearly shows that it is an attempt to compel the owners of the Fourche River Valley & Indian Territory Railroad to give to the Bryant Lumber Company the railroad company's earnings upon lumber of equal tonnage to that shipped by the Bryant Company over the Rock Island from Fourche. If the rate be 19c. from Fourche to St. Louis on the shipments of the Bryant Lumber Company, then the result of this judgment gives that company a rate of 17c. from Fourche. The demand of the Bryant Lumber Company submitted to arbitration was that it be given "the same freight concessions" by the Fourche River Valley & Indian Territory Railroad Company as are now enjoyed by the Fourche River Lumber Company. The Elkins act prohibits the payment by anyone for or on account of any shipments in interstate commerce whereby such transportation is had at less than the published tariff rate. The award of the arbitrators complied with the demand for a freight concession from the Fourche River Valley & Indian Territory Railroad Company. This freight concession was measured at two to four cents per hundred pounds and to that extent at least given the Bryant Lumber Company interstate transportation at less than the lawful published tariff rates.

3. *The Interstate Commerce Commission alone has jurisdiction in the first instance to require establishment of switch connection or award damages for*

failure to make such connection or damages for unjust discrimination.

No joint through rate was published by the Fourche River Valley & Indian Territory Railroad and the Rock Island on logs originating at points on the Fourche River Valley & Indian Territory Railroad, moving via Bigelow over the Rock Island to the mill at Fourche, milled in transit at that point and transported as lumber from Fourche to interstate destinations. The Rock Island has no milling in transit rates on logs converted into lumber at stations on its line. (Record 18). The carriers throughout all the territory south of the Arkansas River and west of the Mississippi apply a blanket rate on lumber. That is to say, a shipment from Lake Charles, La., over the Rock Island to St. Louis, takes the same rate as a shipment from Little Rock or Fourche to the same destination. To refund to the Bryant Lumber Company the cost of getting logs to the mill at Fourche is in effect establishing a joint rate upon logs milled in transit at Fourche and the lumber thence to the interstate destination. This court has said in numerous cases, beginning with the *Abilene Cotton Oil case*, 204 U. S. 426, that the courts have no jurisdiction to entertain suits to recover for excessive freight charges without first going to the Interstate Commerce Commission. We quote from that decision as follows:

> When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences

and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the

divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy, could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established

> schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Further citation is unnecessary on this point. We need but observe that the only body which, under the present system of laws, can prescribe rates for the future, or award damages for unreasonable or unjustly discriminatory rates, is the Interstate Commerce Commission. The defendant in error should have gone to the Interstate Commerce Commission to secure that equality which it contended was its right under the contract. The board of arbitrators was absolutely without any jurisdiction to consider any matter affecting either the spur track, the rate on logs or the award of damages for the so-called differential.

If it be unjustly discriminatory for the Fourche River Valley & Indian Territory Railroad Company to receive two cents out of the joint through rate for the movement of the logs of the Fourche River Lumber Company to its mill at Greytown, and the movement of lumber manufactured at that point to Bigelow, that fact should have been brought to the Interstate Commerce Commission and been determined in the first instance by that body. If awarded damages, that award could be made the basis of a suit in court, but certainly no court has jurisdiction in the first instance to entertain such a suit as the one herein. This observation applies to all the demands of the Bryant Lumber Company and submitted to the arbitrators, because the Act to Regulate Commerce now covers the matter of switches and all facilities and instrumentalities of shipment or carriage, irrespective of

ownership or of any contract, express or implied, for the use of the same.

The Act to Regulate Commerce as amended June 18, 1910, provides for a switch connection or private sidetrack. The pertinent provision

> If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

This provision of the Act prior to its amendment, June 18, 1910, was construed by this court in the case of *Interstate Commerce Commission vs. Delaware, Lackawanna & Western Railroad Company,* 216 U. S. 531. At that time the law required application to be made in writing on complaint of the shipper only. The lateral branch line of railroad had made the request and filed the complaint with the Commission. This was held not to be sufficient and that a shipper must make the complaint before the Commission has jurisdiction to order the switch connection. This pro-

vision has been amended so that now complaint can be made by any shipper or by the owner of the branch line railroad. The point we here make of this provision of the statute and the decision by this Court last referred to is, that the Interstate Commerce Commission alone had jurisdiction to order the establishment of the switch track connection and therefore there was no jurisdiction in the Court below to entertain suit based upon any award by anybody except the Interstate Commerce Commission.

As to the matter of discrimination complained of as to the extent of the differentials awarded by the judgment below, this Court has recently passed upon that question not only as to rates, but as to preferences. In the case of *Baltimore & Ohio Railroad Company vs. United States*, 215 U. S. 481, this Court held that there was not original jurisdiction in the Circuit Court to compel by mandamus a redress of grievances as to regulations covering car distribution. We quote from that decision:

> One of the assignments of error assails the correctness of the conclusion of the Court below, to the effect that, compatibly with the Act to Regulate Commerce, there was power, under the circumstances disclosed by the record, to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the

relief prayed consistently with the provisions of the Act to Regulate Commerce, and to that subject we therefore at once come.

To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required here in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the Act to Regulate Commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the Court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the Act, is sought, and an order, by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions.

The controversy is controlled by the consid-

erations which governed the ruling made in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. In that case suit was brought in a court of the state of Texas to recover, because of an exaction by a carrier, on an interstate shipment, of an alleged unreasonable rate, although the rate charged was that stated in the schedules duly filed and published in accordance with the Act to Regulate Commerce. After great consideration, it was held that the relief prayed was inconsistent with the Act to Regulate Commerce, since by that Act the rates, as filed, were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out that any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the Act, and, in effect, cause the Act to destroy itself. The ruling there made dealt with the provisions of the Act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the Act by that ruling, since, by Section 4, as enacted by the amendments of June 29, 1906, (34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1158), the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to

> become operative without judicial action. In considering Section 4 in the case of *Illinois C. R. Co. v. Interstate Commerce Commission*, just decided, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the *Abilene case*, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the Act to Regulate Commerce.

It therefore seems abundantly established by the previous decisions of this Court that the defendant in error, Bryant Lumber Company, should have gone to the Interstate Commerce Commission in the first instance and presented its complaint.. In the absence of an order from the Commission requiring the establishment of a switch connection or awarding damages for alleged discriminations and preferences there was no jurisdiction in any court to entertain the suit to reverse judgment in which this writ of error is prosecuted. All the discriminations and prejudices which the defendant in error allege were inflicted upon it were likewise and to the same degree (if at all as to Bryant Lumber Company) discriminations and prejudices against all other shippers of lumber over the Fourche River Valley & Indian Territory Railroad Company. To give the Bryant Lumber Company 2c. per hundred

pounds on all its shipments while denying to all other shippers on the line a like refund is but to commit the discriminations and preferences forbidden by the Act. We therefore submit that the judgment of the Supreme Court of Arkansas should be reversed and the contract declared unlawful in its entirety.

Respectfully submitted,

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Attorneys for Plaintiff in error.

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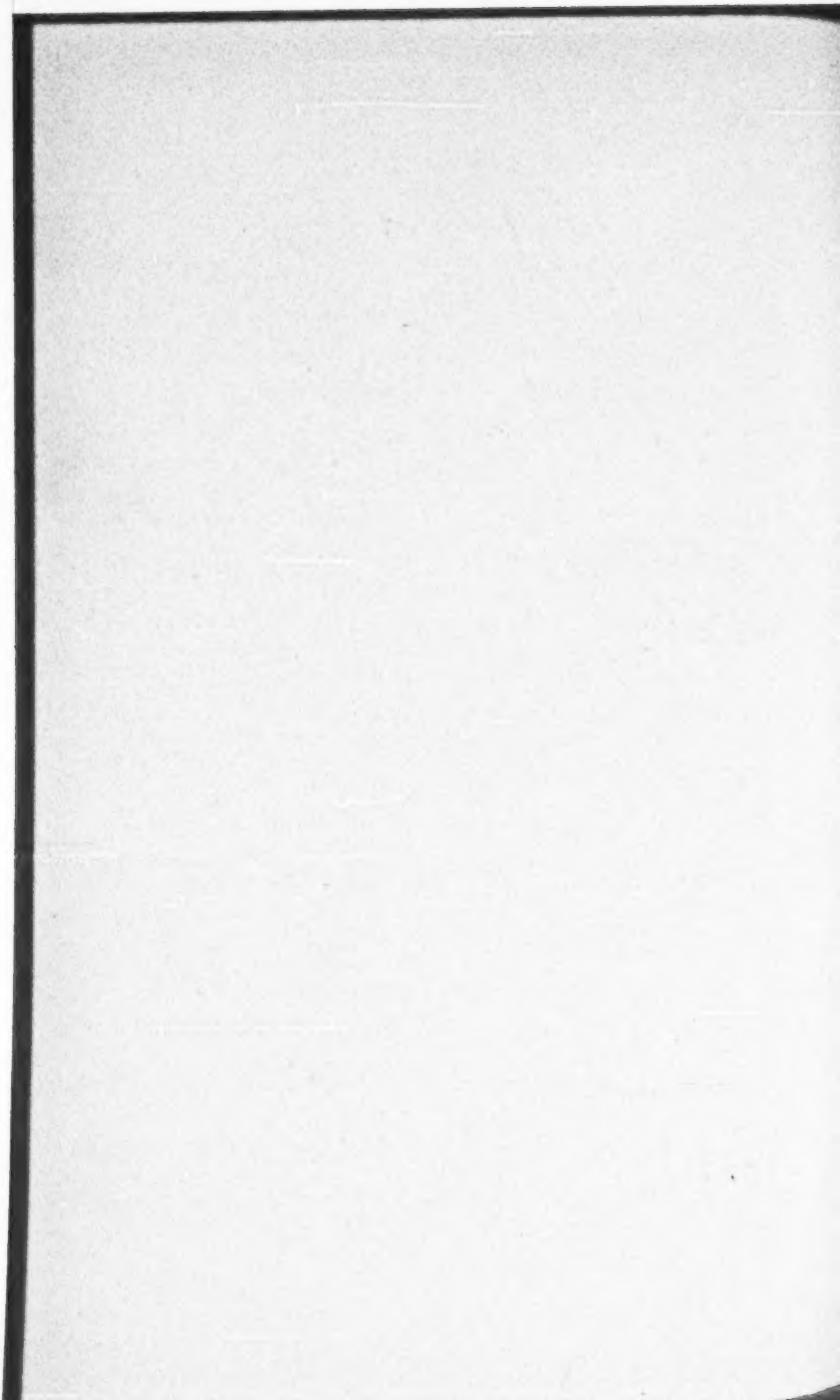

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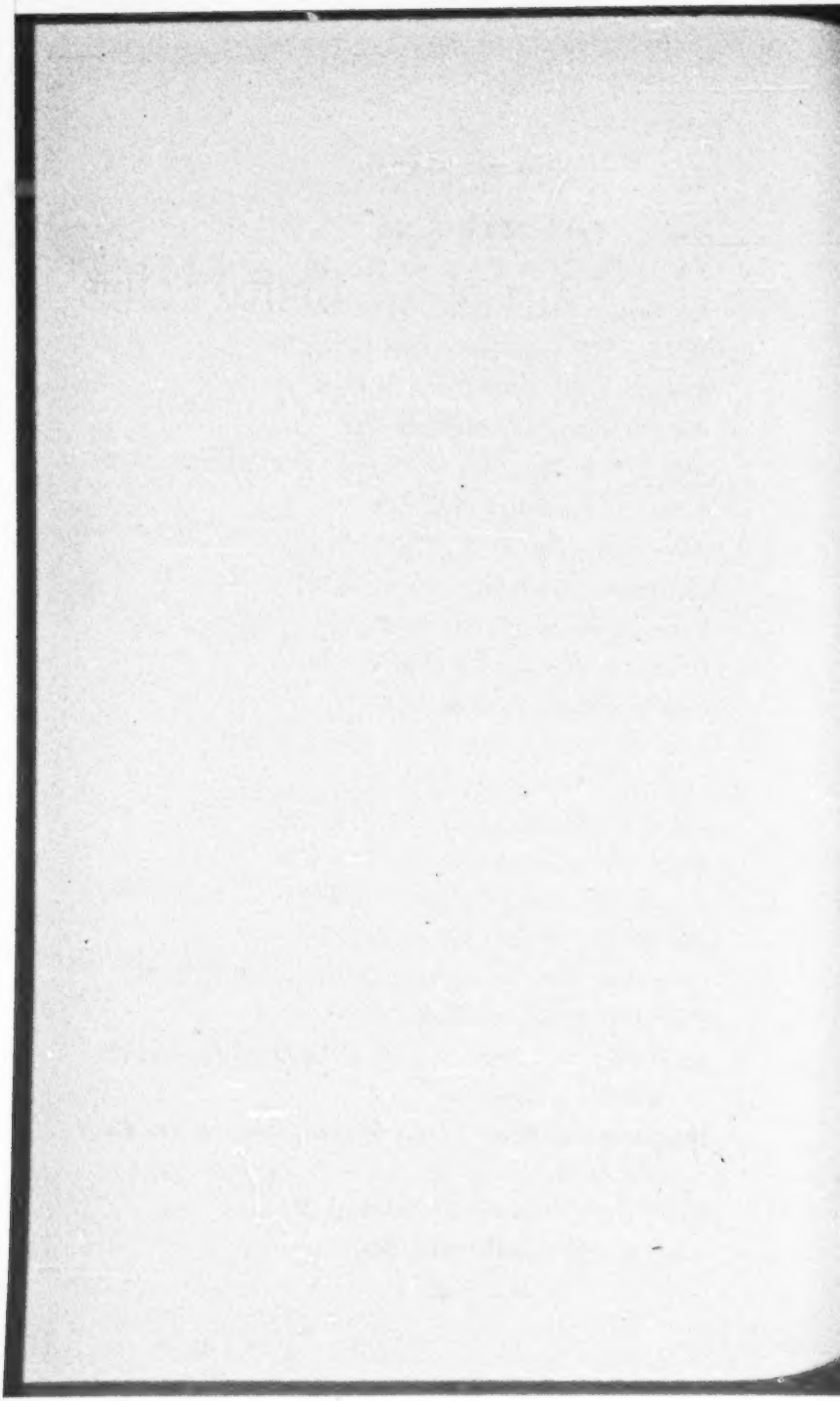

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 296.

FOURCHE RIVER LUMBER COMPANY ..... *Plaintiff in Error*

v.

BRYANT LUMBER COMPANY ..... *Defendant in Error*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE FOR DEFENDANT IN ERROR.

As the statement of the case in the brief of the plaintiff in error does not disclose clearly the features regarded as material from our point of view, we deem it not improper to add the following:

The parties to this suit are rival lumber companies located in the same neighborhood and prior to this litigation, were drawing their supply of logs, etc., from forests in which they both owned or controlled timber lands. The Bryant Lumber Company, the defendant in error, prior to August 3, 1905, owned a pass highly valuable for a railroad

right-of-way back into the forests, from which the logs were obtained and through which it was about to construct a railroad for the purpose of transporting its logs to its mill from the forest beyond. To this end, it had established its line and procured a charter from the proper State authorities. An application for a charter upon the part of the Fourche Lumber Company, plaintiff in error, was at the same time denied, but it nevertheless took possession of the lands and the pass and commenced the construction of its road, claiming that it did so under authority of the Bryant Lumber Company (see recitals in the contract, R. p. 39). This the Bryant Company denied and intense controversy arose destructive to the interests of both parties. To adjust and determine their deference so that neither might enjoy an unfair advantage over the other, they entered into the contract of August 3, 1905, which forms the basis of this suit (R. p. 39). The object of the contract as expressly declared therein, was, that the Fourche Lumber Company should cause to be carried the timber and other freight of the Bryant Lumber Company, equally and impartially without discrimination for or against the Bryant company, and that each party should have such fair and equal opportunity as would enable it to compete in all respects with the other in the purchase and holding of the lands, timber and other interests in the territory, and on or with the road (R. p. 42). Both parties contemplated the building of tram roads and logging roads to connect with the contemplated railroad, and the contract secured to the Bryant company, defendant in error, the right to build such roads and to connect them with the roads of the Fourche River Lumber Company or the roads of the railroad which the Fourche

company guaranteed to be built, as freely as the Fourche company might do either as to roads then built or thereafter to be built, not, however, to interfere with the switches or spur which the Fourche Lumber Company had at the time located. The further provisions of the contract material to this inquiry are as follows:

6. The Fourche Company agrees that it will cause the incorporation of the Fourche River Valley & Indian Territory Railroad Company as soon as they can procure a hearing before the Board of Railroad Incorporations, to renew their application for a charter for the Fourche River Valley & Indian Territory Railroad that if said charter is granted it will guarantee completion of the construction of the road called for within five years from the date of the charter.

As to lands then owned by the Bryant, it was provided:

1. The Fourche Company will cause to be hauled timber off of all lands now owned by the Bryant Company, as well as off of all lands on which it has acquired timber rights, as the title to said lands and timber rights is shown by the records of Perry county, when loaded on its cars and on its railroad by the Bryant Company, at the rate of 37½ cents per thousand feet.

As to after-acquired lands:

2. The Fourche Company agrees that for a period of ten years from date, it will cause to be hauled the timber of the Bryant Company for its mill off of lands which it shall hereafter acquire, or upon which it shall hereafter acquire timber rights, when loaded on its cars on its railroad at a

price to be fixed by arbitration as is hereinafter set out. And the Fourche Company agrees that when loaded cars are received from the Bryant Lumber Company, they will be carried forward to destination, if consigned to a point on the line of the Fourche River Valley & Indian Territory Railroad, or to the end of its line, if consigned beyond it, without transfer or freight from one car to another.

3. The Fourche Company agrees that the Bryant Company may build tramroads or railroads connecting with its railroad and the railroad of the Fourche River Valley & Indian Territory Railroad Company, as now built or hereafter constructed, for the purpose of hauling any timber that it may now own or hereafter acquire, at any place where such tramroad or railroad of the Fourche Company had already located; and it will cause to be hauled for the Bryant Company any engines or cars it may desire to use on its road from the Choctaw Railroad to its railroad, and when the use of its road is discontinued, the Fourche Company will again cause to be hauled such engine or cars from the discontinued road to any point on its line where the Bryant Company may have built another road; but the Bryant Company will not be authorized to operate its engines or cars on the line of the Fourche Company.

4. The Fourche Company agrees that whenever the Bryant Company desires to build a railroad or tramroad connecting with its road or the road of the Fourche River Valley & Indian Territory Railroad Company to reach any timber which it now owns or may hereafter acquire, that the Fourche Company will give the right-of-way over any land that it then owns for the purpose of building such railroad or tramroad,

but the same must not in any way interfere with the construction or operation of the Fourche Company.

5. *This contract is made by the Fourche Company in contemplation of perfecting the incorporation of the Fourche River Valley & Indian Territory Railroad Company, whose articles of incorporation and map are now on file in the office of the Secretary of State, and of its acquiring and operating a line of road herein referred to; and the Fourche Company agrees that it will pay any difference between the price that may be charged by the Railroad Company for the hauling of the timber now owned or hereafter acquired by the Bryant Lumber Company, and the price fixed for said service by the terms of this contract, and further agrees that said Railroad Company will perform the railroad service for wihch it herein binds itself.*

The Bryant Company agrees:

1. That it will join with the incorporators of the Fourche River Valley & Indian Territory Railroad Company in their effort to secure a charter for the Fourche River Valley and Indian Territory Railroad Company, in accordance with the articles of association and map heretofore presented to the board, and now on file in the office of Secretary of State.

2. It agrees that the Fourche River Valley & Indian Territory Railroad Company, when duly incorporated and organized, according to law, may occupy and enjoy the right-of-way now occupied by the railroad of the Fourche Company over the lands of the Bryant Company as hereinbefore set out, and that it will execute the necessary deed of conveyance fully investing said Fourche River Valley & Indian Territory

Railroad Company with said right-of-way for railroad purposes, as soon as the said Fourche River Valley & Indian Territory Railroad Company is duly incorporated and organized, and it further agrees that the said Fourche River Valley & Indian Territory Railroad shall have a free right-of-way over the lands of the Bryant Lumber Company, now owned or hereafter acquired for the purpose of constructing the unconstructed parts of its road, and that upon the incorporation and organization of the Fourche River Valley & Indian Territory Railroad, the said right will be granted to it. And it agrees that the Fourche Company may have the free right-of-way over the lands of the Bryant Company, acquired or to be acquired for the purpose of building tramroads to reach its timber, but such rights-of-way must be taken so as not to interfere with the construction or operation of the road of the Bryant Company.

The parties mutually agree:

That the price for hauling future acquired timber of the Bryant Company over the railroad of the Fourche River Valley & Indian Territory Railroad Company, shall be fixed by a board of Arbitration composed of Judge Robert J. Lea, and two other men, one to be chosen by each of the parties hereto; said board shall have the authority to settle any other differences that may arise between the parties hereto as to the details of carrying out this contract, such as hauling, loading and unloading of timber and other freight, and the time when and the manner in which it is to be done, so that the Bryant Company shall be secured against any discrimination in favor of the Fourche Company in the transaction of its business; and the Fourche Company shall be required to carry timber

and other freight equally and impartially without discrimination for or against the Bryant Company. And it is understood that each party shall have such fair and equal opportunities, so they can compete in all respects with each other in the purchase and holding of the lands, timber and other interests in that territory and on and with the rialroad. And the Fourche Company agrees that neither it nor the Fourche River Valley & Indian Territory Railroad Company will do any act that will prevent the Bryant Lumber Company from having a fair opportunity to compete with the Fourche Company in all respects in the purchase, holding and sale of lands or timber or the products thereof in that vicinity, or in the transportation of freight over said road. * * *

The contract concluded with a provision that it should be ratified by the boards of directors of the respective parties, and by the board of directors of the Fourche River Valley & Indian Territory Railroad within fifteen days after its incorporation, "*provided such ratification by the railroad company shall not bind it to fix the rates fixed by this contract*" (R. bottom page 42 and top page 43).

In answer to the complaint of the Bryant Lumber Company, defendant in error, brought to enforce the award provided the contract, the Fourche Lumber Company answered by denying that it had failed to comply with the contract with respect to spurs and switches and "*denies that it has refused to secure to the plaintiff any freight concessions from the Fourche River Valley & Indian Territory Railroad, which it could lawfully give.*"

This is the only allegation in the pleadings under which it is contended that the interstate commerce act was involved.

The plaintiff below asked the court upon the trial to instruct the jury as follows:

IV.

You are instructed that the claim of the plaintiff for differentials was not within the terms of the contract, nor properly submitted to the arbitrators, and you will find for the defendant as to that issue.

The court refused to give said instruction numbered (IV), to which action of the court refusing to give said instruction, the defendant at the time saved its exceptions.

V.

You are instructed that the payment to plaintiff the differentials provided for in the fourth paragraph of the award of the arbitrators would be the granting to plaintiff of a rebate forbidden by law, enabling the plaintiff to transport its goods at less than the tariff rates, and you will find for the defendant on that issue.

The court refused to give said instruction numbered (V), to which action of the court refusing to give said instruction, the defendant at the time saved its exceptions.

The only express reference in the record to the interstate commerce act appears for the first and only time in the motion for rehearing filed in the Supreme Court of Arkansas. The motion for new trial made in the lower court pointed out no specific objection to the ruling of the court in refusing the instructions, but simply alleged that the court "erred in refusing to give each of defendant's instructions, instructions numbered 1, 2, 3, 4, 5 and 6."

The Supreme Court of the State, in rendition of its opinion, held:

"We held that the point submitted was within the scope and purview of the contract made between the parties and the award having been made, appellant was bound to its performance and liable in damages for its failure. It secured valuable rights by this contract upon the theory that both companies should be placed in like condition on equal terms for the delivery of timber and sale of lumber manufactured from timber shipped over said road, that was and is in fact owned by the same persons who own the appellant company with which this original contract was made. Since they in effect have an advantage in the sale of lumber, the timber for the manufacture of which comes over said Territory Railroad, of the division received by said company as an originating line from the connecting carrier, we see no reason why appellant should not pay to appellee company an amount equal thereto upon its lumber manufactured from logs delivered over said road as the arbitrators have found that they should do. There was testimony on this point, showing the amount of $2,650.35, figured, at a less rate than the division of rates shown to be received by said Territory Railway.

Nothing is being asked from the Territory Railway Company in this suit and only a performance of its contract by appellant in accordance with the award made thereon under its terms. The verdict of the jury was for the lump sum of $3,978.00 damages, a little more than half of the amount claimed, for all the injuries complained of, and there was no finding of any sum on any separate claim made under the award. It shows that the jury did not accept the largest statement of damages of any witness, and the testimony is sufficient to sustain their verdict.

POINTS AND AUTHORITIES.

The writ of error should be dismissed for the following reasons:

1. No right or immunity under the interstate commerce act having been pleaded or claimed by the plaintiff in error with sufficient particularity until the motion for rehearing was filed in the State Supreme Court, it was then too late to sustain writ of error.

Miller v. Texas, 153 U. S. 535.

Texas & Pac. R. R. Co. v. So. Pac. Co., 137 U. S. 48.

Caldwell v. Texas, 137 U. S. 692, 698.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291.

Budzisz v. Ill. Steel Co., 170 U. S. 41.

2. The writ will not be sustained because the judgment of the Supreme Court of Arkansas was based upon grounds entirely sufficient to sustain it independent of the interstate commerce act, and did not regard the act as involved.

Ballinger v. Iowa, 18 Wall. 129.

Detroit City R. R. Co. v. Suthard, 114 U. S. 133.

Fisher v. Cockrill 5 Pet. 248.

Allen v. So. Pac. R. R., 173 U. S. 480.

3. The Fourche Lumber Company itself has no interest in nor is it concerned with the validity of the rates charged by the Fourche River Valley & Indian Territory Railroad Company. No right of plaintiff in error under the interstate commerce act is denied or involved and it can not set up such right for another.

McNulta v. Lochridge, 141 U. S. 327.

Brown v. Smart, 145 U. S. 455.

Owings v. Norwood, 5 Cranch, 344.

Hale v. Gaines, 22 Howard, 144.

Iron Clifts Co. v. Negaunee, 197 U. S. 463.

Long v. Converse, 91 U. S. 105.

Pinney v. Sheppard et al., 177 U. S. 170.

That the Fourche Lumber Company received by reason of its affiliation with the Fourche River Valley & Indian Territory Railroad advantages in the way of rate concession which it enjoyed over the Bryant Company was a question of fact which was determined by the judgment of the lower court and which this court will not review.

Hendrix v. Atchison, 167 U. S. 673.

Gardner v. Bonesteel, 180 U. S. 362.

Christian v. Miller, 197 U. S. 313.

Chapman & Co. Land Co. v. Bigelow, 206 U. S. 41.

Thayer v. Sprall, 189 U. S. 376.

ARGUMENT.

No right under the interstate commerce act was properly plead or involved with sufficient particularity in the lower court to sustain the writ. It has been repeatedly held by this court that it must appear by direct terms or by necessary intentment that a Federal question was brought to the attention of the State court and decided by it and it is too late to present the question upon motion for rehearing in the State court. The answer of the plaintiff in error neither claimed nor asserted any right under the Constitution or any law of

the United States and presented no such question. The only intimation upon which such a proposition could be based is the allegation (R. p. 11) that "it denies it has refused or secured to the plaintiff any freight concessions from the Fourche River Valley & Indian Territory Railway Company which *that company* could lawfully grant or which was contemplated by the contract."

On the trial, the court was asked by plaintiff in error to instruct (R. p. 107) "that the payment to plaintiff the differentials provided for in the fourth paragraph of the award of the arbitrators would be granting to plaintiff a rebate forbidden by law, enabling the plaintiff to transport its goods at less than the tariff rated and you will find for the defendant on that issue." No further reference to the proposition appears in the pleadings until a motion for rehearing was filed in the Supreme Court. The answer certainly could not be said to draw in question the interstate commerce act, and the instruction which merely asked the court to say to the jury that the award of the arbitrators in the fourth paragraph was forbidden by law without specifying what law or whether the same was a State or Federal statute, we submit was wholly insufficient to raise a question under the interstate commerce act.

First National Bank v. City Council of Estherville, 215 U. S. 223.

Susquehanna Boom Co. v. West Branch Boom Co., 110 U. S. 57.

Maxwell v. Newbold, 18 Howard, 511.

Scott v. Jones, 5 Howard, 344.

The Fourche River Lumber Company had no right at stake wherein the validity of rates fixed by the Fourche River Valley & Indian Territory Railroad were involved. Its contract with the defendant in error simply bound it to see that the Bryant Company enjoyed the benefit of all conditions, including the rates which were imposed upon or enjoyed by it in its relations to the railroad company. This undertaking upon its part was the whole consideration upon which the Bryant Company parted with its valuable rights. The history of the litigation discloses that it was against just such a condition as is here presented that the Bryant Company sought by the contract to protect itself. The relations of the Fourche River Lumber Company to the railroad which it agreed to organize, were such that advantages by the Fourche Lumber Company in the way of rates and transportation facilities, lawful or unlawful, might easily be practiced. This situation, as the record clearly discloses, was what the Bryant Company sought to protect itself against by the contract and which the Fourche Lumber Company agreed should not in any respect prevail. The fact that the Fourche Company had entered into such a contract with the Bryant Company created no obligation upon the part of the railroad company to the Bryant Lumber Company in any respect. While the railroad company through its board of directors was required to ratify the contract, it was expressly provided that the ratification thereof should not "*bind it* (Fourche River Valley & Indian Territory Railroad) *to fix the rates fixed by the contract.*" The Fourche River Valley & Indian Territory Railroad Company is neither a party to this controversy nor has it any rights involved. The contract expressly stipulated (R. p. 40): "And the Fourche Company agrees that it will pay the

difference between the price that may be charged by the railroad company for hauling the timber now owned or hereafter acquired by the Bryant Lumber Company and the price fixed for said services by the terms of this contract; and further agrees that said railroad company will perform the railroad services for which it (that is, the Fourche River Lumber Company) herein binds itself." There is nothing in the whole record to disclose that any agreement in contravention of the provisions of the interstate commerce act were either intended or accomplished. We submit that there could be nothing unlawful or in violation of the act for the Fourche Lumber Company upon considerations which it deemed sufficient to enter into a contract by which it either guaranteed rates to the Bryant Company or agreed to account to it for any advantages it received through its relationship to the railroad from the Bryant Company any more than it would be unlawful for a board of trade in the promotion of a new industry in a community to guarantee a lower freight rate upon its commodities than it would be lawful for carriers to make. The carrier is not asked nor bound to make such a rebate or deduction. In this case no obligation is assumed by the carrier. So far as the record discloses no unlawful concessions were made by it to either party; but whether lawful or unlawful for the carrier which is not a party to this suit, *it has been found and established as a matter of fact by the judgment of the court below* that the Fourche River Lumber Company had received and was receiving the advantages herein set forth which were not received or enjoyed in any way by the Bryant Company. We submit that having received valuable considerations at the hands of the Bryant Company to protect it

against this condition, the Fourche Company can not be heard to say that if the railroad company should make the same allowance to the Bryant Company that it received, that it would thereby be guilty of a violation of the interstate commerce act.

The construction of the contract to the effect that the obligations assumed by the Fourche Company to the Bryant Company bound the Fourche Company independent of any question of interstate commerce, is the construction which was stamped upon the contract by the court below and upon which its judgment was based as is manifest from the instructions given upon the trial and the opinion rendered by the Supreme Court wherein reference is made to the fact that nothing is asked of the railroad company.

The construction of the contract was based upon questions of general law concerning it.

Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615.

Commercial Pub. Co. v. Beckwith, 188 U. S. 567.

The record clearly discloses that this contract was entered into in the utmost good faith to secure substantial and lawful rights and to avoid the very discriminations and favoritisms among shippers which the interstate commerce act itself was designed to accomplish. No other shipper is entering any complaint against the performance of this contract, nor is the Fourche River Valley & Indian Territory Railroad Company claiming any interest in this litigation or protest-

ing, or is being called upon to conform to any of the requirements of the contract between the two lumber companies.

We respectfully submit that the record discloses no error in the judgment of the Supreme Court of the State.

CHAS. C. REID,

T. M. MEHAFFY,

Attorneys for Defendant in Error.

FOURCHE RIVER LUMBER COMPANY *v.* BRYANT LUMBER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 296. Argued May 6, 1913.—Decided June 9, 1913.

Carriers, whether saw-mill companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way.

A rebate made for purchase of land is illegal even though much less than the value of the land acquired.

The prohibitions of the Act to Regulate Commerce against rebates cannot be evaded by calling them differentials or concessions, nor by taking the money from a corporation that is the same as the rebating carrier.

97 Arkansas, 623, reversed.

THE facts, which involve the right, under the Act to Regulate Commerce, of a carrier to pay rebates to a shipper in consideration of a right of way granted by the latter, are stated in the opinion.

Mr. Luther M. Walter and *Mr. W. E. Hemingway*, with whom *Mr. U. M. Rose*, *Mr. G. B. Rose*, *Mr. D. H. Cantrell*, *Mr. J. F. Loughborough* and *Mr. M. W. Borders* were on the brief, for plaintiff in error:

The contract of August 3, 1905, became invalid as to the rate for transportation of logs when tariffs were filed by the Fourche River Valley & Ind. Terr. R. R. Co. prescribing another and different rate from the contract price.

The award of the arbitrators and the judgment of the court awarding damages equal to the amount of the division of the joint rate received by the Fourche River Valley & Ind. Terr. R. R. Co. constitutes a device where-

by the Bryant Lumber Company is given transportation at less than the published interstate rates.

The Interstate Commerce Commission alone has jurisdiction in the first instance to require establishment of switch connection or award damages for failure to make such connection or damages for unjust discrimination. *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Tex. & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Int. Com. Comm.* v. *D., L. & W.*, 216 U. S. 531; *Balt. & Ohio* v. *United States*, 215 U. S. 481.

Mr. Charles C. Reid, with whom *Mr. T. M. Mehaffy* was on the brief, for defendant in error:

No right or immunity under the Interstate Commerce Act having been pleaded or claimed by the plaintiff in error with sufficient particularity until the motion for rehearing was filed in the state Supreme Court, it was then too late to sustain writ of error. *Miller* v. *Texas*, 153 U. S. 535; *Texas & Pac. R. R. Co.* v. *So. Pac. Co.*, 137 U. S. 48; *Caldwell* v. *Texas*, 137 U. S. 692, 698; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *Budzisz* v. *Ill. Steel Co.*, 170 U. S. 41

The writ will not be sustained because the judgment of the state court was based upon grounds entirely sufficient to sustain it independently of the Interstate Commerce Act, and did not regard the act as involved. *Ballinger* v. *Iowa*, 18 Wall. 129; *Detroit City R. R. Co.* v. *Suthard*, 114 U. S. 133; *Fisher* v. *Cockrill*, 5 Pet. 248; *Allen* v. *So. Pac. R. R.*, 173 U. S. 480.

The Fourche Lumber Company itself has no interest in nor is it concerned with the validity of the rates charged by the Fourche River Valley & Ind. Terr. R. R. Co. No right of plaintiff in error under the Interstate Commerce Act is denied or involved and it cannot set up such right

for another. *McNulta* v. *Lochridge*, 141 U. S. 327; *Brown* v. *Smart*, 145 U. S. 455; *Owings* v. *Norwood*, 5 Cranch, 344; *Hale* v. *Gaines*, 22 Howard, 144; *Iron Clifts Co.* v. *Negaunee*, 197 U. S. 463; *Long* v. *Converse*, 91 U. S. 105; *Pinney* v. *Sheppard et al.*, 177 U. S. 170.

That the Fourche Lumber Company received by reason of its affiliation with the Fourche River Valley & Indian Territory Railroad advantages in the way of rate concession which it enjoyed over the Bryant Company was a question of fact which was determined by the judgment of the lower court and which this court will not review. *Hendrix* v. *Atchison*, 167 U. S. 673; *Gardner* v. *Bonesteel*, 180 U. S. 362; *Christian* v. *Miller*, 197 U. S. 313; *Chapman Land Co.* v. *Bigelow*, 206 U. S. 41; *Thayer* v. *Spratt*, 189 U. S. 376.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Bryant Lumber Co. had its mill and saw mill plant at or near Bigelow, Arkansas, on the Rock Island Railroad. The Fourche Lumber Co.'s plant was located near by on a spur track laid about a mile from the main line of the Rock Island R. R. Both of these lumber companies owned timber in a rough, hilly country which could only be reached by a railroad, belonging to the Bryant Co. The Fourche Lumber Co. had already built a road on this land, claiming that it had been granted a right-of-way by the Bryant Co., and had applied for a railroad charter. This application was resisted by the Bryant Co., which denied that it had made any grant of a right-of-way. Finally, and in order to avoid threatened litigation the parties, in August, 1905, entered into an agreement in which, among many other matters, it was provided that a charter should be granted to the Fourche River Valley & Indian Territory R. R., to be organized by the Fourche Company; that the Bryant Co. would grant this Fourche Railroad a right-of-way and that the Fourche Co. was to

arrange for the building of switches to enable the Bryant Co. to reach its timber, which was to be transported at 37½ cents per 100, and that "the price for hauling future acquired lumber of the Bryant Co. over the Fourche R. V. & I. T. R. R. should be fixed by a board of arbitrators, who should have authority to settle any differences that might arise between the parties as to the details of carrying out the contract," and "so that the Bryant Co. might be secured against any discrimination in favor of the Fourche Co. in the transaction of its business, and the Fourche Co. shall be required to carry timber and other freight equally without discrimination for or against the Bryant Co."

The Fourche Co. agreed that it would cause the contract to be ratified by the Fourche River Valley & Indian Territory R. R. Co. Thereafter the contract was carried out; the Fourche R. R. was incorporated; the Bryant Co. made to it a conveyance of the right of way as stipulated; the railroad was constructed and hauled freight in intrastate and interstate commerce.

There was evidence that all of the stock of the Railroad, except one or two qualifying shares, were held by the persons who owned the Fourche Lumber Co., but the two corporations kept separate books, and when the Railroad made dividends they were paid to its stockholders of record.

In August, 1907, differences arose between the parties and under the provisions of the contract the Bryant Co. demanded an arbitration of several matters in issue—among others submitting to the Board the following proposition:

"Fourth. That the Fourche River Lumber Company through the Fourche River Valley & Indian Territory Railroad Company shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same freight concessions as

are now enjoyed by the Fourche River Lumber Company, through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company."

The arbitrators found in favor of the Bryant Company and the terms of the award not having been complied with, the Bryant Company brought suit against the Fourche Lumber Company.

It appears that under the blanket rate, then of force, the same rate of freight was charged from any point in Arkansas to St. Louis, to Memphis or to Oklahoma points. Out of this through rate the Rock Island allowed 2, 3 and 3½ cents to the Fourche R. R. on all lumber originating on such road and shipped over the Rock Island to St. Louis, Memphis or Oklahoma. This division of through rate between the two roads on interstate shipments was noted on the tariffs filed with the Interstate Commerce Commission.

On the trial, the president of the Bryant Co. testified that it had shipped 13,251,759 pounds of lumber in interstate shipments, and on it the Bryant Co. claimed 2 cents per 100.

Being asked what was the basis of the claim he said: "They are getting it. Q. Who is getting it? A. The Fourche River Vy. & Indian River R. R., which are the same people as the Fourche River Lumber Co. Q. They are two separate and distinct corporations? A. Yes." In reference to the claim for failing to lay the tracks and switches as agreed he was asked: "Did the Fourche R. R. furnish you with a profile? A. I don't know that it was the Railroad Co., it was the lumber company I think. Q. Who did you get the profile from?—The Lumber Co. or the Railroad Co.? A. I don't know. To me they are all the same. Q. I understand that; it is to your advantage to have them all the same, but as a matter of fact from which institution did you get the profile? A. I could look

at the papers and see which one wrote the letter, but it is the same people all the time."

The defendant excepted to the refusal of the court to instruct the jury that "a payment to the plaintiff of the differentials provided in the award of the arbitrators would be the granting to the Bryant Co. of a rebate forbidden by law, enabling the Bryant Co. to transport its goods at less than the tariff rate and you will find for the defendant on that issue." Instead of giving the charge requested the court instructed the jury that "under the contract, and findings of the arbitrators, the Fourche Lumber Co. was required to pay the Bryant Co. the same differentials that the Fourche R. R. received on interstate shipments of the Fourche Lumber Co. If you find from the testimony that the Fourche R. R. has received certain differentials from the Rock Island on interstate shipments and that the Fourche Lumber Co. has not paid to the Bryant Lumber Co. the same differentials on lumber that the Bryant Co. has shipped to the same territory, then you are instructed that the defendant (Fourche Co.) is indebted to the Bryant Co. the amount of any such differentials which it has not paid."

A judgment on the verdict rendered in accordance with this charge having been affirmed, the Fourche Lumber Company brought the case here, insisting that the charge and verdict were in violation of the Interstate Commerce Act, and, in effect, amounted to the giving of a rebate to the Bryant Lumber Company. The latter replies that the suit is against the Fourche Lumber Co. and that there is no law preventing one company from paying the whole or any part of the freight due by another. That may be true but not where that other party is sued as being in effect a common carrier engaged in interstate commerce. The arbitration was demanded and the award made on the theory that, inasmuch as the contract provided that there should be no discrimination, the Bryant Company

was entitled to receive from the Fourche Lumber Company "the same freight concessions as are now enjoyed by the Fourche Lumber Company through its interest and the interest of its owners in the Fourche Railroad." This suit is based upon the assumption that the two companies are identical in fact, though different in name.

Thus treating it, the case is as though the Bryant Lumber Company had sued the Fourche Lumber Company, doing business as an interstate carrier, for so much of the through rate as had been paid to it on the division by the Rock Island for hauling the Bryant Company's shipments of lumber. To state the proposition is to manifest its illegality, and to show that thereby the Bryant Company would get a reduction on the through rate on all of its lumber originating on the Fourche line.

The Fourche Railroad was not only incorporated as a common carrier but is treated as such by the Interstate Commerce Commission, and, under the filed tariffs of the Rock Island road, receives a part of the through rate on all lumber originating upon the line and shipped in interstate commerce. The status of this road is discussed in *Tap Line Cases*, 23 I. C. C. 277, and its right to a division of the freight recognized notwithstanding the fact that the stockholders are the same as those who own the shares of the Fourche Lumber Company. But it receives this part of the through rate, not as a concession, but for services actually rendered by it as a common carrier in hauling freight for part of the distance between the point of origin and the point of destination. In any other view it would have been unlawful for the Rock Island to pay, and, if so, no agreement to divide such unlawful receipts would be enforced by the courts. On the other hand, if the Fourche Railroad was lawfully paid for such services in hauling the lumber it would be illegal, directly or through a subsidiary, to give to the shipper a part of such joint rate under any pretext whatever. Carriers, whether saw-mill

companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way, even though the amount of such rebate was much less than the value of the land thus acquired. Cf. *Louisville & Nashville Ry. Co.* v. *Mottley*, 219 U. S. 467; *United States* v. *Lehigh Valley Railroad*, 220 U. S. 257; *United States* v. *Union Stock Yards*, 226 U. S. 287, 308.

The Commerce Act prohibits the payment of rebates, and its command cannot be evaded by calling them differentials or concessions, nor by taking the money from the Railroad itself or from a company that is proved to be the same as the Railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a lumber company to shippers.

The suit in the present case proceeds on the theory that the Fourche Lumber Company and the Fourche Railroad are the same and that therefore the division of the through rate allowed to the Railroad was in fact received and enjoyed by the Lumber Company. And yet, notwithstanding that fact, it is claimed that if the Fourche Lumber Company should, under the contract, pay a part of that freight to the Bryant Company it would do so as a saw-mill and not as a carrier. The law will not permit such a chameleon-like change. The Fourche Lumber Company and the Fourche Railroad are either the same or different. If they are the same it cannot refund a part of the rate to the Bryant Company. If they are different the Fourche Lumber Company was not bound by the terms of the contract to make the payment now demanded. The court below found that they were the same and not different, and it results that its judgment must be

Reversed.